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ABSTRACT

A collection of essays on the 10 amendments that comprise the Bill of Rights to the U.S. Constitution is presented in commemoration of the 200th anniversary of the ratification of the Bill of Rights. The following essays are included: "The First Amendment and the Virtues of an Open Society" (R. Smolla); "The First Amendment as a Guardian of Liberties" (M. Halperin); "The First Amendment and the Role of a Free Press in a Free Society" (B. Sanford); "An Unsettled Arena: Religion and the First Amendment" (R. White, Jr.); "The Second Amendment: The Right to Bear Arms" (W. Burger); "The Fourth Amendment, Privacy, and Modern Technology: A Time for Reassessment" (G. Trubow); "The Right of the People to be Secure in Their Persons, Homes, Papers, and Effects" (Y. Kamisar); "Freedom of Speech and the Privilege Against Self-Incrimination" (Justice W. Erickson); "Reconcilable Rights to a Fair Trial and a Free Press" (R. Mazer; D. Kelly); "The Eighth Amendment: An Analysis" (R. Fine); "The Ninth Amendment and Rights Not Enumerated" (R. Peck); "The First and Tenth Amendments in a Federal System: The States and Free Speech" (R. O'Neil); and "Crucial Connection: First and Fourteenth Amendments" (D. Gillmor). The Bill of Rights also is listed, as is information about the contributors, and a glossary of key terms. (DB)

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A TIME *for* CHOICES

Edited by
Claudia A. Haskel
and
Jean H. Otto

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The Bill of Rights

Amendment
I Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment
II A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment
III No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment
IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment
V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment
VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment
VII In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment
VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment
IX The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment
X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Introduction

December 15, 1991, marks the 200th anniversary of the ratification of the Bill of Rights. This year we not only celebrate two centuries of our own freedom, but as nations around the world adopt principles of democracy, open markets, and freedom of speech, press and religion, we will join in the celebration of their newly found liberty.

As citizens of the free world, Americans have much to be grateful for. However, before the nation becomes absorbed in another bicentennial celebration, we encourage Americans to enter a period of study, contemplation and dialogue about the future of the Bill of Rights.

As our society heads into its third century, people are questioning whether their freedoms work for them, or against them. They are affected by terrorism. Drugs. Gang warfare. Rampant crime. Official secrecy. They are appalled by the lack of integrity in people they need to trust.

Americans are troubled by confrontations over flag burning, obscene photographs and music. They question rights long held sacred, because those rights seem to conflict with values held equally sacred.

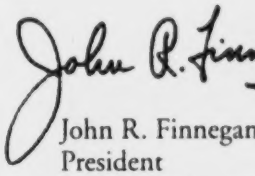
New technologies outdate current privacy and public "right to know" standards at increasingly rapid rates. If citizens do not understand the real and potential effects of new technology on individual privacy and access to information, new judicial interpretations and statutes may not reflect the consensus of society.

The media face similar concerns. They seek to maintain balance on a constantly shifting tightrope of personal privacy, access to information and government accountability. Research indicates declining public confidence in the credibility of the press. If the American people do not support a free press, the courts will be encouraged to restrict journalists' access and ability to investigate government affairs. If government information is not accessible to members of the press, it cannot be accessible to citizens.

Did our Founding Fathers have the foresight to know the complex conditions we would face today when they developed the Bill of Rights? If they were here now, how would they react to our current state of affairs? Would they consider limiting the "great freedoms" in order to secure a safer society?

Significant and evolving issues promise to reshape interpretations of the First Amendment and the Bill of Rights in the 21st century. Even as new democracies adopt the rights we secured 200 years ago, America is at a historical crossroads. One road turns away from our great experiment of individual freedom. The other preserves the rights that have made citizenship in this country the envy of millions around the world.

The choice is ours.



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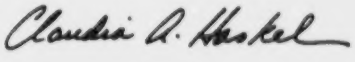
President
First Amendment Congress



Claudia A. Haskel
Executive Director
First Amendment Congress

THE FIRST AMENDMENT CONGRESS is committed to preserving freedom of expression among Americans of every persuasion by providing a continuing forum to discuss and debate the First Amendment as our cornerstone of liberty. Founded in 1979 by 12 major print and broadcast news media associations, the First Amendment Congress is now a coalition of 16 voting member and 30 associate member organizations.

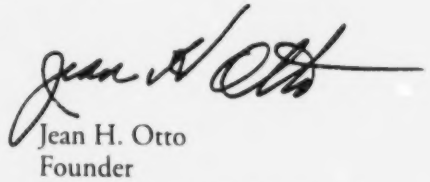
As a Center at the University of Colorado at Denver's Graduate School of Public Affairs, the First Amendment Congress produces regional and national congresses, seminars, forums, education curricula, a quarterly newsletter and special research publications relating to First Amendment issues.

Statement of Purpose

The First Amendment Congress was born of the belief that the rights embodied in the First Amendment and all of the Bill of Rights belong to every American, individually and collectively, and that they can best be preserved by understanding them, supporting them and sharing the principles that gave them life and nourish their vitality.

It is for this that the First Amendment Congress brings together Americans of all persuasions in discussion of those rights and privileges that our Founding Fathers held sacred and unassailable. It is for this that we challenge citizens to examine their commitment to individual liberties. It is to our quest for a nation of people who perceive liberty itself as their most treasured possession that all First Amendment Congresses, the celebration of the Bicentennial of the Bill of Rights, and this book are dedicated.

Those who had the courage and foresight to bestow on future generations the freedoms they so treasured for themselves, and those who will cherish and defend them into the future, are most honored by their own embrace of liberty. Our own purpose can be no more. It should be no less.



Jean H. Otto
Founder
First Amendment Congress

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Robert F. Nagel, author of discussion pieces following each paper, is the Rothgerber Professor of Constitutional Law at the University of Colorado School of Law. He has had appointments as a visiting professor at Cornell Law School, University of Michigan Law School, and the Marshall-Wythe School of Law at the College of William and Mary. Professor Nagel is the author of *Constitutional Cultures: The Mentality and Consequences of Judicial Review*, and has written extensively on constitutional law, constitutional theory, and the law of corrections.

About the Contributors

Rodney A. Smolla is the Arthur B. Hanson Professor of Law, and the director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law. He writes and speaks extensively on constitutional law issues and has taught at the DePaul, Illinois, Indiana, Arkansas and University of Denver law schools. Professor Smolla was appointed in 1989 to the position of Reporter to the Advisory Committee to the Commission on the Bicentennial of the United States Constitution. In addition to publishing numerous law review articles, he is author of *Suing the Press: Libel, the Media, & Power*, the legal treatise *Law of Defamation*, and *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*.

Morton H. Halperin is the director of the Washington, D.C., office of the American Civil Liberties Union. He is also director of the Center for National Security Studies, a joint project of the Fund for Peace and the ACLU Foundation. Previously, Dr. Halperin served for more than three years in the federal government. For six years prior to that time, Dr. Halperin was associated with Harvard University where he was an assistant professor of government and a research associate of the Harvard Center for International Affairs. He has authored, co-authored and edited more than a dozen books, including *Top Secret* and *Freedom vs. National Security*.

Bruce W. Sanford, a partner with the Washington, D.C., office of Baker & Hostetler, is a widely recognized authority on First Amendment law and the American news media. He is counsel to the Society of Professional Journalists and has represented Scripps Howard, The New York Times, The Chicago Sun Times, Independent Newspapers, Inc., UPI, CBS, PBS, Gannett Co., Inc., and the Hearst Corporation in a broad range of libel and First Amendment matters. Mr. Sanford is author of *Synopsis of Libel and Privacy* (Pharos Books), *Libel and Privacy* (Prentice Hall), and is chairman of the board of trustees of The Thomas Jefferson Center for the Protection of Free Expression.

Ronald C. White Jr. is a scholar at the Huntington Library in San Marino, California. He has served as a college and university chaplain, a pastor, and a professor, most recently serving at Princeton Theological Seminary. He is co-editor of *An Unsettled Arena: Religion and the Bill of Rights* and author of *Liberty and Justice for All: Racial Reform and the Social Gospel*. Mr. White is a visiting professor at The School of Theology at Claremont and the University of California at Los Angeles.

Warren E. Burger, former Chief Justice of the United States (1969-86), was born in St. Paul, Minnesota, on Constitution Day, September 17, 1907. After graduating from St. Paul (now William Mitchell) College of Law *magna cum laude* in 1931, he served as an adjunct professor there while engaged in private practice. In 1953, President Eisenhower appointed him assistant attorney general of the United States and three years later to the U.S. Court of Appeals. In May 1969, President Nixon appointed him Chief Justice of the United States. He served in that office until September 1986. Warren Burger was appointed chairman of the Commission on the Bicentennial of the United States Constitution by President Reagan in 1986 and will serve in that position until 1992.

George B. Trubow is director of the Center for Informatics Law and a professor of law at The John Marshall Law School. In 1966, Professor Trubow was appointed deputy counsel to the U.S. Senate Judiciary Subcommittee on Improvements in Judicial Machinery, and later was appointed general counsel to the Domestic Council Committee on the Right to Privacy, Executive Office of the President. He is chairman of the American Bar Association's Committee on Information Practices and Privacy and is an adviser to the Office for Technology Assessment of the U.S. Congress. Professor Trubow is editor of the treatise, *Privacy Law and Practice*, and chairs a series of annual national symposia on information technology and ethics.

Yale Kamisar, Henry K. Ransom Professor of Law at the University of Michigan, is a leading commentator on constitutional law and criminal procedure. Following his practice with Covington & Burling, Professor Kamisar began teaching at the University of Minnesota Law School in 1957; in 1965 he joined the faculty of the University of Michigan Law School. He is co-author of widely used casebooks on constitutional law and criminal procedure, has contributed chapters to *The Burger Court: The Counter-Revolution That Wasn't* and *The Burger Years*, and is

the author of some 30 law review articles. Professor Kamisar also has written op-ed pieces on criminal procedure, freedom of expression and religious liberty for many of the nation's leading newspapers.

William H. Erickson is an associate justice on the supreme court of the State of Colorado, and served as chief justice on that court from 1983 to 1985. His professional honors are extensive, including: Board of Governors, the American Bar Association; founder and chairman, Colorado Bar Association's Criminal Law Section; former president, Denver Bar Association; member, Council of the American Law Institute, and chairman, Fellows of the American Bar Association. Justice Erickson is the recipient of the Colorado Bar Association Award of Merit and the Colorado School of Mines Distinguished Achievement Medal.

Roslyn A. Mazer is a litigation partner at the Washington, D.C., law firm, Dickstein, Shapiro & Morin, where she specializes in media law. She has successfully defended *The New Yorker Magazine* in a libel suit arising from the *Westmoreland v. CBS* case, and is now defending a libel suit brought by Dr. Eric Foretich against *Glamour* magazine arising from the custody dispute between Dr. Foretich and Dr. Elizabeth Morgan. In 1987, Ms. Mazer co-authored a much-quoted brief *amici curiæ* in the Supreme Court on behalf of political cartoonists in *Hustler Magazine v. Falwell*. She is a member of the Committee for Revision of a Czechoslovak Constitution, the Advisory Board of the Institute of Bill of Rights Law, and the Annenberg Washington Program's 1988 Libel Reform Project.

Deborah P. Kelly is an associate at the Washington, D.C., law firm, Dickstein, Shapiro and Morin. She formerly worked in the Governmental Studies Program at the Brookings Institution and was a professor of government at the University of Maryland and the American University. Dr. Kelly has published extensively on legal issues related to victims of crime and is currently a member of the American Bar Association Criminal Justice Section's Long-Range Planning Committee and vice-chair of its Victims Committee.

Ralph Adam Fine is a judge on the Wisconsin Court of Appeals. He is the author of many professional-journal articles, and four books, including *Escape of the Guilty* and *Fine's Wisconsin Evidence*. After nine years as trial judge, he was elected in 1988 to serve on the Wisconsin Court of Appeals. Judge Fine is an elected member of the American Law Institute, and was formerly a television journalist and the host of a TV talk show.

Robert S. Peck is a 1990-91 U.S. Supreme Court Judicial Fellow and an adjunct professor of law at American University. After practicing public interest law in New York City, Mr. Peck served as staff director for the American Bar Association Commission on Public Understanding About the Law. Among his books are *Constitutional Rights and the Politics of Interpretation* and *We the People: The Constitution in American Life*, companion volume to the public television series he also wrote. Mr. Peck is immediate past president of the Freedom to Read Foundation, the First Amendment legal defense fund of the American Library Association.

Robert M. O'Neil became founding director of The Thomas Jefferson Center for the Protection of Free Expression in August 1990, after serving five years as president of the University of Virginia and a member of its law faculty. Mr. O'Neil began his academic career in 1963 as a professor of law at the University of California at Berkeley and has served as law clerk to Supreme Court Justice William J. Brennan Jr., provost of the University of Cincinnati, vice president of Indiana University and president of the University of Wisconsin. He is past chairman of the National Association of State Universities and Land-Grant Colleges and serves on the boards of several distinguished organizations. He is the author of *Classrooms in the Crossfire*, *Free Speech: Responsible Communication Under Law*, and *Civil Liberties: Case Studies and the Law*.

Donald M. Gillmor is professor of journalism and mass communication and director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota in Minneapolis. He is co-author of *Mass Communication Law: Cases and Comment*, and is author or editor of *Free Press and Fair Trial*, *Enduring Issues in Mass Communication*, *Justice Hugo Black and the First Amendment*, and *Media Freedom and Accountability*. In 1989-90, he was a senior fellow at the Gannett Center for Media Studies, Columbia University, where he completed a study of public official and celebrity libel litigation.

The First Amendment and the Virtues of an Open Society

Rodney A. Smolla is the Arthur B. Hanson Professor of Law, and the director of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law.

By Rodney A. Smolla

THE FIRST AMENDMENT'S interlocking guarantees of freedom of speech, press, religion, association, assembly, and petition combine to express America's profound commitment to the preservation of an open culture. The value of "openness" is broader than freedom of speech. A society that embraces openness as a value of transcendent importance will defend human expression and conscience in all its wonderful variety, protecting freedom of speech, freedom of the press, freedom of religion, freedom of association, freedom of assembly, and freedom of peaceful mass protest. These freedoms will be extended not just to political discourse, but to the infinite range of artistic, scientific, religious, and philosophical inquiries that capture and cajole the human imagination.

A society that wishes to adopt openness as a value of overarching significance will not merely allow citizens a wide range of individual expressive freedom, but will go one step further, and actually open up the deliberative processes of government itself to the sunlight of public scrutiny. In a truly open culture the normal rule is that government does not conduct the business of the people behind closed doors. Legislative, administrative, and judicial proceedings should, as a matter of routine, be open to the public.

The Marketplace of Ideas and Democracy

The justification for openness begins with the rationale that humankind's search for truth is best advanced by a free trade in ideas. The "marketplace of ideas" is perhaps the most powerful metaphor in the free speech tradition. In a democracy, the marketplace of ideas is no mere abstraction; it is critical to the legitimacy of government. There is no principle more fundamental to democracy than the elemental proposition that all just governments derive their powers only from the consent of the governed. This consent is not made one time only, when the government is first formulated. Rather, the citizen is entitled to an ongoing participatory role in the process of self-governance. Freedoms of speech, press, association, and assembly are means of participation, the vehicles through which individuals debate the issues of the day, cast their votes, and actively join in the processes of decision-making that shape the polity.

This entitlement to participate has an electoral dimension and an expressive dimension. On the electoral side, citizens participate by being eligible for governmental office and by being allowed to vote freely for political candidates and parties. On the expressive side, citizens participate by exercising their freedom of speech to attempt to influence policies and register dissent. Openness facilitates majority rule. A society that has set out to govern itself democratically needs a

large degree of openness to ensure that collective policy-making represents, to the greatest degree possible, the collective will.

Governments instinctively fear openness, often viewing it as promiscuous and dangerous, fostering a decline in order, efficiency, and stability. Governments will always tend to exert too much control on individual speech and conscience, and will tend to be too jealous of their secrets and confidences. A society that wishes to take openness seriously as a value must devise rules that are deliberately tilted in favor of openness—tilted more than may at first seem reasonable—in order to counteract the inherent impulse of governments to engage in control, censorship, and secrecy.

One of the great insights of the American First Amendment is the recognition that openness and democracy at times will conflict. For while openness is an aid to democracy, the democratic process on occasion will produce decisions by the majority to squelch the speech of the minority. When democracy and openness come into conflict, a society will be both more stable and more free in the long run if openness prevails. This is an extremely difficult principle to accept. Why shouldn't the concept of majority rule always prevail in a democracy, even on questions of freedom of expression? How can protecting a minority viewpoint against the wishes of the majority actually improve stability and order?

When governments can be persuaded to err on the side of openness, they learn to their surprise that openness *improves* the resiliency and stability of government, and it often increases efficiency by uncovering official iniquity or incompetence. While it may at times seem counter-intuitive, openness actually encourages social stability. If societies are not to explode from festering tensions, there must be valves through which the citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more violence than it triggers; free debate dissipates more controversy than it stirs.

Most importantly, however, openness serves the interests not of the government but of the people. The participatory interest served by freedom of speech in a democracy grows primarily out of the entitlements of citizens, not the needs of the state. Openness is the most powerful restraint humankind has yet devised on tyranny. It is through non-violent speech that the people may ferret out corruption and discourage tyrannical excesses, keeping government within the metes and bounds of the charter through which the people first brought it into existence.

Openness vindicates the individual's right to join the political fray, to stand up and be counted, to be an active player in the democracy, not a passive spectator. This openness value both protects and provokes the expressive spirit. On its surface it is a negative restraint on government: But beneath the surface lies a more vexing voice, one that affirmatively *encourages* citizens to speak, to take stands, to demand to be heard, to demand to *participate*.

Openness and the Human Spirit

The marketplace theory justifies openness as a means to an end. But an open society is also an end itself, an end intimately intertwined with human autonomy and dignity. Openness does not merely serve the needs of the polity, but also those of the human spirit—a spirit that demands to be heard. Openness is thus especially valuable for reasons that have nothing to do with the collective search for truth or the processes of self-governance, or with any other conceptualization

of the common good. The First Amendment embraces a right to defiantly, robustly, and irreverently speak one's mind just because it is one's mind. Even when the speaker has no realistic hope that the audience will be persuaded to his or her viewpoint, even when no plausible case can be made that the search for truth will be advanced, freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment.

It might be argued that this is an exceptionally selfish, almost hedonistic justification for openness. If the majority is convinced that it is reasonable to stifle an individual's expression for the greater good of the whole society, why should the majority be prevented from imposing its view on the individual?

The answer is that the freedoms encompassed by the openness value, freedoms of speech, press, religion, assembly, and demonstration, are freedoms that define humanity itself. The fulfillment that comes from free expression is bonded to an individual's capacity to think, imagine, pray, and create. Conscience and consciousness are the sacred precincts of mind and soul. The linkage of speech to thought, to a person's central capacity to reason and wonder, is what places it above other forms of fulfillment, and beyond the routine jurisdiction of the state.

Few in the modern world would defend the prerogative of the state to censor thought. Only by accepting that a human being is a creature of the state could such a monstrous and awesome intrusion into the intimate internal processes of the mind be justified. To accept the proposition would be to accept the annihilation of thousands of years of moral evolution, in which the world has come slowly and painfully to recognize that people possess certain entitlements to dignity and autonomy by sheer virtue of their humanity. Descartes' statement, "I think, therefore I am," is an assertion about existence. If one adds, "I think, therefore I am somebody deserving of respect," one has an assertion about humanity.

Once the inviolable primacy of freedom of thought is accepted, the preferred position of openness as a societal value follows. This does *not* mean that the government has no more claim on regulation of speech than it does on thought—for unlike thought, speech involves other human beings, and thus can cause harm. But it *does* mean that because speech is connected to thought in a manner that other forms of gratification are not, it is proper to place special burdens on the state when it ventures to regulate speech that would not exist when it regulates other aspects of human activity. It is no answer to insist that thinkers should keep their thoughts to themselves, for the human urge to think includes an urge to think out loud. Thought and speech are complementary, reinforcing freedoms, freedoms that partake at once of the private and social aspects of personality. The human spirit is nourished by both thought and speech, as the body is nourished by both food and water.

The Future Challenges to Openness

The future challenges to openness in America and around the world will come not from evil human impulses but from good ones. Pressures on freedom of expression and conscience will come from the progress of man—from changes in world politics, from breakthroughs in science and technology, from heightened concern for the environment and world health, from the struggle for greater racial, ethnic, and religious tolerance.

The Challenges of Environmental and Public Health Thinking

Freedom of speech in the future will be constantly challenged by the laudable human impulse to use law as an instrument for the pursuit of the good life. Restrictions on speech are often passed out of the same habits of mind that create environmental zoning or bans on smoking. Restrictions that seek to curtail vulgarity, racism, sexism, appeals to lust, or insults to religious groups, and movements to prosecute rap music or art exhibits for obscenity, or to prohibit the desecration of the national flag, are thus often seen by their proponents as simple "quality of life" measures, laws that curtail the moral pollutants that degrade individuals and undermine community values. Environmental and public health laws improve the physical quality of life and are essential to human progress. But they encourage a pattern of thought that is *not* appropriate for matters of expression and conscience.

The Challenges of New Technologies

Satellites, computer networks, and digital transmission technologies have the potential, in combination, to transform profoundly our notions of communication and freedom of speech. Forms of communication are converging, collapsing the legal distinctions that once brought a semblance of order to free speech policies. For most of this century societies could draw lines of demarcation separating print media, broadcast media, and common carriers. New technologies, however, are rendering those divisions obsolete.

Electrons know no national borders. Distance will impose few barriers in modern communication systems. The distinction between "domestic" and "foreign" publishers will gradually dissolve. Global communications satellites, the linking of multiple international communications networks, and the convergence of various communications technologies will tend to make news organizations true citizens of the world.

These are wonderful changes, but they come with threats to freedom of speech and conscience. As we become one global communications market, the contrast between the American First Amendment tradition and the thinking about freedom of speech in the rest of the international community will become increasingly vivid. The rest of the world may not be ready for our First Amendment—when they study it closely they may be shocked. For although virtually the entire globe now embraces freedom of expression as a basic human right, other nations tend to think of it as a highly qualified right—governments are usually permitted to regulate speech whenever it is deemed "reasonable" to do so. Only the United States has adopted, as part of its constitutional structure, the principle that speech may not be curtailed whenever threats to public safety, health, decorum, or morality seem to make such regulation "reasonable." Our First Amendment requires government to restrain itself from regulating speech unless the peril is grave and immediate. As we become a global marketplace of ideas, there will be inexorable pressure toward uniformity in thinking about freedom of speech. The rest of the world will either move toward the American tradition, or America will move toward a watered-down notion of freedom of speech more in conformity with international custom.

Freedom of speech is a human yearning—insistent, persistent and universal. Recent world events underscore the fantastic promise, the poignant frailty, the emotional intensity, and the increasing complexity of freedom of speech in the

modern world. From Warsaw, Prague, Budapest, East Berlin and Bucharest to the Baltic States, what was once unthinkable became commonplace as mass demonstrations overwhelmed governments in one nation after another, ushering in a new epoch of freedom and democracy. In the 200th anniversary of the First Amendment, the greatest challenge of all is to work incessantly to ensure that the exuberant energies unleashed by these events are directed toward fulfillment of the wonderful promise of truly open societies. ❦

Discussion:

Rodney Smolla argues that the central goal of the First Amendment is an open society. In such a society opinions and information can be freely traded in a robust, unregulated "marketplace of ideas." Although Professor Smolla does not say that truth will necessarily emerge in an open society, he does identify important moral advantages for both government and individuals. Government gains legitimacy because an open society permits effective political participation, encourages stability and resilience, and prevents official corruption. Individuals gain the inner satisfaction and dignity that come from exercising "a person's central capacity to reason and wonder."

Because an open society serves such fundamental values, Professor Smolla urges that our First Amendment rights should protect openness even when the results seem at first to be unreasonable or to sacrifice the greater good of the whole society. He suggests several examples where such self-discipline is likely to be especially necessary in the future. Spawned by the environmental movement, there are growing pressures to restrict expression by legislating against "moral pollutants" like racism and obscenity. There are also significant new technologies, such as satellites and computers; these changes will provide both opportunities and dangers as they bring strong American First Amendment traditions into direct competition with international standards that are less sympathetic to the virtues of an open society.

Although the vibrant pleasures of unrestricted self-expression have strong appeal, Professor Smolla recognizes that other important freedoms are often limited for the sake of societal values. He insists, however, that free expression is different in that it is linked to "an individual's capacity to think, imagine, pray, and create" and that these capacities define what it is to be human. Do you agree that unrestricted expression is so closely linked to our humanity? If we did not have a right to burn the American flag or to speak an ethnic or racial slur, would we be any the less human? How? What would you reply to someone who believes that good medical care or adequate nutrition or wholesome family life are at least as fundamental to our humanity as such expressive rights?

A related issue worth discussing is the relationship between unfettered expression and democratic accountability. Do you think that cross burning should be protected expression even if it is intended to intimidate members of minority races? In what ways does pornography increase or decrease political participation? Is unregulated expression more essential to influencing governmental policy than is, say, rough equality in the distribution of private property?

Professor Smolla refers to "America's profound commitment" to openness. In what ways has American society made such a commitment? Do you believe that those who framed our Constitution thought they were committing us to the kinds of rights Professor Smolla associates with an open society? To what extent have our legislatures been committed to such rights? To what extent our courts? If many Americans do not approve of specific aspects of an open society—such as flag burning or obscenity—in what sense might we still have a profound commitment to an open society?

The First Amendment as a Guardian of Liberties

Morton H. Halperin is the director of the Washington, D.C., office of the American Civil Liberties Union. He is also director of the Center for National Security Studies.

By Morton H. Halperin

THE PRIMARY PURPOSE of the free speech clause of the First Amendment was to ensure the right of every person to speak, to express his or her views without the need for a license from the government or the fear of persecution. However, there is more than this to the First Amendment. As the Supreme Court has said, it embodies and reflects the nation's commitment to free and open debate about matters that affect the survival and welfare of our citizens.

The First Amendment is thus a guardian of all of the other liberties embodied in the Bill of Rights. It provides a means by which citizens can learn of the violation of those rights and can protest such abridgments of our fundamental liberties. In order for the First Amendment to function in this way, it must be seen to embody more than the right to speak, to express what is on one's mind. The First Amendment must be seen to include the right to find out what is going on, to gather the facts necessary for every person to participate fully in the debate about the future of the nation.

The Right to Know and Gather Information

Knowledge is of little use if one is not free to express one's views based on the information one has. At the same time, the right to speak is of lesser value if one does not have the information that tells one when he or she must speak, and the information to participate effectively in that debate. Thus, to fulfill its full role, the First Amendment must include a right to know and to gather information.

Fortunately, the Supreme Court has recognized the right to know as a part of the First Amendment in a variety of contexts. Regrettably, it has too often subordinated that right to other governmental interests. In some cases Congress has stepped in and fulfilled the promise of the First Amendment through legislation.

The role of the First Amendment as a guardian of our liberties can be understood by considering ways in which government hinders access of citizens to private information, the right to government information, and the requirements of open decision making. Each of these is discussed briefly in turn to provide an understanding of how the First Amendment does and should function.

If one accepts the view that the First Amendment includes a right to know and to gather information, then it follows that, at the very least, government should not interfere with the ability of Americans to gather information from sources other than the government. Yet in many situations the federal and state governments have done just that. They have asserted that other interests are so important as to outweigh the First Amendment interest in permitting citizens to gather information.

Nowhere is this more clear than with respect to information from abroad. The president, the Congress, and the courts have all upheld restrictions on the free flow of information and ideas in and out of the United States, while recognizing the First Amendment rights that were at stake. Over the past few years a coalition on free trade in ideas has worked to remove these barriers.

Government Restrictions on the Free Flow of Information

The most notorious of these restrictions were embodied in the McCarran-Walter Immigration Act which permitted the government to deny visas, because of their political beliefs or activities, to those invited to speak in the United States. In a case involving a denial of a visa to a Belgian Marxist, the Supreme Court laid out the right to know, to gather information embodied in the First Amendment, in its clearest form. Nonetheless, the Court went on to uphold the visa denial. In 1990 Congress made a permanent change in the immigration laws to bar the denial of visas based on the political beliefs or intended lawful political actions of the person invited to visit the United States. The executive branch, however, continues to deny visas to those invited to speak in this country, claiming a "foreign policy" entitlement to do so.

Other U.S. laws deny Americans the right to travel abroad to determine for themselves what is going on in a foreign country even if there is no danger to their safety by traveling to that country. In upholding these restrictions the Supreme Court once again acknowledged that First Amendment interests were being abridged, but held that these rights had to yield to the national security interests of the nation as defined by the president. As of August 1990, legislation was pending in the Congress to guarantee the right to travel to all countries except those in which there was a direct physical threat to the traveler. This change in the law would remove current restrictions on travel to Cuba and the right to organize tours to Vietnam.

In a third area relating to free trade in ideas, Congress has already acted to remove the authority of the president to prohibit the import or export of informational material, including books and magazines. Thus, Americans no longer need a license to subscribe to a magazine from a country against which the United States is imposing a trade embargo, or to send a newspaper to such a country. As of August 1990, the government was interpreting its remaining powers broadly, denying an American the right to travel to Cuba to arrange for the importation of prints, denying ABC the right to televise the Pan Am Games from Cuba, and claiming the right, because of the UN embargo, to prohibit trade in informational material with Iraq.

In other contexts as well, governments have sought to impose restrictions on the right of the press and other Americans to gather information for themselves from private sources. In some cases the courts have sustained these restrictions; in others they have been more skeptical. For example, the courts have upheld limitations on the right of the press to visit prisons in order to interview prisoners about conditions in the prison. On the other hand, courts have generally been skeptical of efforts to close trials and to deny to the press the right to publish information about what takes place in the courtroom. The Supreme Court has noted that trials were traditionally open at the time the Constitution was drafted and that the right of citizens to know what is going on in the courts is an important part of

the right to know that is implicit in the Constitution as a whole and in the First Amendment.

Access to Government Information

The Supreme Court has been much less hospitable to the notion that the First Amendment guarantees a right of access to government information. The First Amendment is not a "Freedom of Information Act," one justice has written for the Court in denying a petition to have information released. Yet there is much to be said for the argument that the First Amendment precisely implies a freedom of information act. The First Amendment includes a commitment to robust public debate on issues affecting the nation and its people; this the Court has accepted. On many issues, such debate is no longer possible without government information. More and more subjects are so technical that they cannot be debated in a serious way without access to data that only the government has.

Here again, the Congress has stepped in to create a statutory right to implement the spirit of the First Amendment. Although many Americans now take for granted the existence of federal and state access laws, their enactment embodies a concept as revolutionary in its day as the First Amendment was in its. President Johnson signed the original Freedom of Information Act in 1964 only after he secured concessions that made the act less than effective, and because he knew that it would otherwise be enacted over his veto. The 1974 amendments which put teeth into the act were passed over President Ford's veto.

The Freedom of Information Act reflects a very simple but very far reaching concept—information in the possession of the government must be made public on demand unless there is a specific well defined and legislatively sanctioned reason for keeping it secret. In a few instances, but not in as many as it should, the act goes further and mandates disclosure of information as soon as it is produced. As it operates now, much information from the federal government and from state governments is made available, permitting Americans to engage much more effectively in public debate about a range of issues, than before the passage of the act.

One of the revolutionary concepts embodied in the Freedom of Information Act is the right of judicial review. If the executive branch refuses to release requested information, the person denied access may file a lawsuit and a court makes the final determination as to whether the information is exempt from disclosure. In the early years after the passage of the act the courts, including the Supreme Court, took account of both Congress' intent and the First Amendment implications of the act and were generally favorable to requesters. More recently, the current Supreme Court, despite its description as a non-activist Court responsive to the will of the legislature, has in fact ruled in favor of the government in most of the FOIA cases it has taken.

One aspect of government information raises the most serious First Amendment issues—access to information about what the government itself is doing. The Freedom of Information Act makes special provision for such information by requiring that agency law and other rulemaking be made public automatically. Congress has also enacted statutes providing that advisory commissions and other deliberative bodies in the executive branch, as a general rule, meet in public.

Congress has been less sensitive to First Amendment requirements in dealing

with its own deliberations. The Framers of the Constitution were especially alert to this problem and specifically required each house to publish, from time to time, a journal of its proceedings. Although few sessions of either house are conducted in secret, the Congress does much of its business behind closed doors. The Congress, for example, has exempted itself from the Freedom of Information Act. In the recent past it did enact legislation providing that committee markups were to be conducted in public unless the committee voted to close the meeting for specified reasons. However, many committees have found a way around this rule by meeting informally or voting to close a session even though the standard for such secrecy was not met. Even on the floor, more and more issues are settled through private negotiations and ratified in pro forma votes.

National Defense and Foreign Policy Information

The area in which the greatest deviation from the public's right to know embodied in the First Amendment has taken place relates to matters of national defense and foreign policy. When national security is seen to be involved, the president, the Congress, the courts, and even the press and the public have tolerated secrecy that all would find unacceptable in other fields.

Perhaps the most blatant deviation is the corruption of the budgetary process stemming from the fact that the intelligence budget of tens of billions of dollars is kept secret. This means that there are deliberate distortions in the rest of the defense budget to hide these expenditures. Congress and the courts have permitted this, despite the explicit requirement in the Constitution that there be a public accounting of expenditures. The Framers understood that to hold government responsible for its actions, citizens needed not only the right to speak but to know what the government was doing. The key to this was to know how the money was being spent and, hence, the Framers ruled out secret budgets. Yet we have them.

The area in which the Framers were most explicit in requiring public information and public debate is paradoxically the area in which we have permitted the greatest deviation. The Framers spent much time debating the process by which the new republic would go to war. They were aware that the nation, to survive, had to be able to engage in war when necessary, even in situations in which its territory was not attacked. At the same time they knew that there was no more momentous decision for a democracy than to decide to spend the treasure of the nation and the blood of its young people in warfare. Thus, the Constitution requires that only Congress can declare war. This means that the president must openly declare his desire for a declaration of war and publicly defend it. The Congress in turn must publicly debate the resolution and vote on it. This process ensures that the people, consistent with the spirit of the First Amendment, can debate the issue and provide their views to the Congress before the fateful decision to go to war is made.

The manner in which the republic in August of 1990 found itself committed to the defense of Saudi Arabia and on the brink of invading Iraq, shows just how far we have come from this norm.

The First Amendment, like much of the American Constitution, was not based on the premise that the Framers created the most efficient system. They recognized that much of the Constitution made it harder for the government to

function. This was, however, a price they thought necessary to ensure the liberty of the people.

For them and for each succeeding generation, the First Amendment is not only among the noblest of those rights, it is also a necessary prerequisite for the protection of many others. It is, in fact, an accident that the First Amendment was the first amendment to the Constitution, but it is also a fact that it stands first in the hierarchy of rights that makes our nation unique and guarantees our ability to defend all of the rights embodied in the Bill of Rights and the Constitution as a whole.

Discussion:

Morton Halperin takes the position that the free speech clause involves not only a right to speak out but also a right to have access to information. Like Professor Smolla, he describes the First Amendment as an embodiment of the nation's commitment to open debate and as the foundation for the rest of our other liberties. He argues that this broad function cannot be served if we are denied access to information necessary for meaningful discussion and decisionmaking.

Dr. Halperin reviews the recent performance of all three branches of government in protecting our right to know. Although the record is mixed, it is generally discouraging. He notes various efforts to restrict the availability of information from abroad and to limit public access to prisons. In the Freedom of Information Act, Congress created significant statutory rights to information about the federal government but exempted its own deliberations. The most serious deviations from the principle of a right to know arise from the secrecy of the intelligence budget and of the deliberations that lead to troop commitments and ultimately to war.

One important question raised by this essay is whether Dr. Halperin's overall assessment of our record on access to information is accurate or excessively gloomy. Americans, after all, have access to massive amounts of information from both private and public sources. Even the record of confidential conversations between President Nixon and his close advisors was made available to a grand jury investigation, and the executive branch could not prevent *The New York Times* from printing a secret and highly embarrassing government report on the Vietnam War. On balance, how serious do you think the situation is?

Dr. Halperin says that "at the very least, the government should not interfere with the ability of Americans to gather information from sources other than the government." But we all know that sometimes the government should interfere with information gathering: you can call the police to prevent a curious prowler, who wants to learn what is in your files, from breaking into your office or home. Once we admit that at least some other interests outweigh information gathering, where should we draw the line? Do you think that television should have the right to broadcast the name of a rape victim or the details of the assault?

Dr. Halperin rightly emphasizes that citizens need information and discussion to know what to think of government policy. Public officials, however, sometimes assert that they need candid advice and uninhibited conversations in order to discharge their duties. Do you think that this need should ever outweigh our right to know? Should the faculty of a public university be permitted to discuss in private the quality of a colleague's scholarly work? Should reporters have a right to sit with a jury during its deliberations? Should the Justices of the Supreme Court be permitted to have secret sessions every week in order to discuss how to decide important cases?

The First Amendment and the Role of a Free Press in a Free Society

Bruce W. Sanford, a partner with the Washington, D.C., office of Baker & Hostetler, is counsel to the Society of Professional Journalists and a widely recognized authority on First Amendment law.

By Bruce W. Sanford

"A FREE PRESS is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny. . . . Under dictatorship the press is bound to languish, and the loudspeaker and the film to become more important. But where free institutions are indigenous to the soil and men have the habit of liberty, the press will continue to be the Fourth Estate, the vigilant guardian of the rights of the ordinary citizen." —Winston Churchill

In the 200 years since the Bill of Rights was enacted, the First Amendment's guarantee of free speech and a free press has often been cited as the premiere symbol of our nation's commitment to an open and democratic society.

Its protections have permitted the press to challenge—and often to correct—the plight of the disadvantaged, the sometimes corrupt activities of the powerful, and the incursions of government into our fundamental individual freedoms.

The First Amendment, essentially, is our single most powerful guardian of the other rights it precedes. The purpose of the Bill of Rights, I think, is to serve as a balance to our majoritarian form of government—it protects the minority voice from being silenced by the majority noise.

Living with the Bill of Rights is not always easy. There are probably precious few among us who really cared whether Ted Bundy's constitutional rights were rigorously enforced during the course of his criminal trials. It's difficult to get on a soapbox to defend the right of 2 Live Crew to record the puerile profanity that has aroused so much ire in southern Florida, nearly impossible to support the right of Nazis or members of the Ku Klux Klan to chant their hateful slogans. But, as Justice Holmes so eloquently noted, "[i]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

The Press's Role as a Public Informant

Living with a free press, too, is often very difficult, particularly for subjects of its often searching scrutiny. In the late 1950s and early 1960s, for example, many southern officials learned the hard way that television coverage of their efforts to quell the Civil Rights movement did not sit well with the citizens of the rest of the country. So, too, did the federal government learn that preserving popular support for a war was much more difficult when the American public watched night after night of bloodshed on the evening news—and was able to read the "classified" Pentagon Papers on the front page of *The New York Times.* Press coverage of the Watergate affair led to the resignation of a sitting president; coverage

of Iran-contra to public outcry.

In June, 1990, when the Supreme Court ruled that a 1989 federal law banning flag burning abridged citizens' rights to free expression, popular outcry was loud. Within an hour of the ruling, President Bush was proposing a constitutional amendment. One newspaper reported nearly 70 percent of its readers would have supported such an amendment and congressional representatives were stumbling over each other to be the first to draft the proposal and pose with the Stars and Stripes. After vociferous and sometimes nasty debate in the halls of Congress, on television newscasts and on the pages of nearly every newspaper in this country, however, Congress wisely decided not to tamper with freedom of expression, and the First Amendment remained intact.

The flag burning controversy was, in fact, only the most recent example of how the media, in its role as a public informant, monitors the courts, the legislatures and the consensus of the citizenry—and sometimes tells us more than we'd really like to know.

That historic role, at least since the 1960s, has been rigorously enforced by the Supreme Court, which has used the First Amendment as a platform for the creation of a firm infrastructure for free expression.

As Justice Black wrote in the *Pentagon Papers* case, his final opinion for the Court:

> In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of the Government and inform the people.

The press's function as government watchdog was immeasurably strengthened by the Burger Court in 1980, when the Court held that the longstanding common law right of the people to be informed about the workings of their government was, in fact, a constitutional right. In *Richmond Newspapers v. Virginia*, an opinion authored by Chief Justice Warren Burger, the High Court held that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw."

Monitoring the Criminal Justice System

Importantly, *Richmond Newspapers* constitutionalized the right of the public—and its "surrogates" in the press—to monitor the workings of the criminal justice system. Beginning that year, it would be impermissible for a judge to close a criminal trial *unless* he found that closure was absolutely necessary to the preservation of a compelling interest, that the compelling interest would be served by closure, *and* unless he made specific findings regarding that interest on the record, in open court, and gave the press a chance to be heard on the issue. This finding was justified, Justice Brennan noted in concurrence, because the First Amendment "has a structural role to play in securing and fostering our Republican system of self-government."

Richmond Newspapers and its progeny ensure that, in years to come, the press

will continue to serve as both mouthpiece and microscope—as an outlet for the free expression of ideas and information, and as an examiner of the inner workings of both the government and its citizenry.

More recently, in a case involving Jerry Falwell and *Penthouse* magazine, Chief Justice William Rehnquist reaffirmed the principle that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind not only is an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of a society as a whole."

Public Versus Private Figures

But only up to a point, it seems. For while the High Court has continuously backed the expression of ideas and opinions about public figures and public controversies, it has recently backed down a bit when the ox being gored belongs to a less well-known subject.

In its 1989-90 term, in *Milkovich v. Lorain Journal Company,* the Court held that there is indeed such a thing as a false idea, and that published statements that imply reasonably false facts *can* therefore form the basis for a libel lawsuit. In an opinion written by Chief Justice Rehnquist, the Court found that Michael Milkovich, a wrestling coach, had a right to sue an Ohio newspaper for printing the accusation that he had lied in a hearing—even when that accusation appeared in the sports column and appeared to be the opinion of the columnist. There is no "wholesale" exemption from libel "for anything that might be labeled opinion," said Rehnquist.

Nor, apparently, is the Court willing to give constitutional imprimatur to protections against privacy suits brought against the press. In *Florida Star v. B.J.F.* (1989), the Court explicitly declined to create for privacy law what Justice Marshall called the "relatively detailed legal standards" it had erected against recovery for libel. "We continue to believe that the sensitivity and significance of the interest presented in clashes between First Amendment and privacy rights counsel [suggest] relying on limited principles that sweep no more broadly than the appropriate context of the instant case." Like *Milkovich, Florida Star* concerned an arguably private figure—the victim of a rape whose name had inadvertently been published in the police blotter section of a small Florida weekly.

The lines apparently have been drawn. So long as the subject of press scrutiny is in the public domain—records and proceedings in public places, public figures and officials, subjects of obvious public interest and concern—the expression of free thought and free opinion will not be actionable, no matter how distasteful or repugnant. The problem with these lines is the burden it places on the press to be responsible for knowing when those lines are being overstepped—and the awful possibility that someday those lines will be redrawn.

The Future of Press Freedom

Parameters of press freedom will most likely be redrawn if the press fails to keep the public's confidence. If editors and journalists insist on accuracy, professionalism and sensitivity in reporting, the public will likely support a free press in the broadest sense. However, if the public loses confidence in the press as a source of unbiased and accurate information, pressures will mount and lines will likely

be redrawn. For, as Alexander Hamilton so eloquently stated in Federalist Paper No. 84, "What is the liberty of the press . . . its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, . . . must we seek for the only solid basis of all our rights."

Discussion:

It is precisely because of the importance of the role of the free press, explains Bruce Sanford, that there are pressures to stifle the free speech rights of journalists. The press investigates, monitors, exposes, educates, and persuades—in short, it irritates those in power. Mr. Sanford characterizes the press as a force for good, pointing to episodes such as Watergate and the termination of the Vietnam War. He describes the mixed record of judicial protections for the press and concludes that journalistic freedom will ultimately depend on public confidence and support. He urges, therefore, not only increased legal protections but also professional self-discipline.

In emphasizing the need for both judicial and popular support for vigorous journalism, this essay pinpoints some central dilemmas. Constitutional insulation from many defamation and invasion of privacy claims has not completely shielded the press from the costs of litigation and the threat of substantial jury verdicts. Numerous observers fear that the press may become excessively timid as a result. On the other hand, enhanced constitutional prerogatives have created immunity for publications that strike many in the general public as being inaccurate and seamy. Mr. Sanford referred to the Court's decision protecting a "parody" published by *Penthouse*. This parody falsely depicted a fundamentalist minister as having had drunken sexual intercourse with his mother in an outhouse. Although some see value in thus deflating a public figure's image, this publication is surely a far cry from, say, exposing President Nixon's misconduct in office. In encouraging courageous reporting on important public issues, must the law also insulate tawdry and harmful writing?

If a strong and independent press does require legal rules that protect both kinds of publications, this essay suggests that there may be a special need to consider ways of promoting public confidence in the work of journalists. But it is possible that the press's elevated role—and the elaborate constitutional protections that go along with it—may be undermining the public support that this essay says are essential to a free press. Mr. Sanford criticizes the Court's position that "there may indeed be such a thing as a false idea"; he approves of the rule that on matters of public interest the press should be immune "no matter how distasteful or repugnant." Are such positions compatible with public confidence? Should the public support legal protections that are premised on such ideas?

It may be that popular sympathy for freedom of the press will be encouraged by journalistic self-discipline. But this essay wisely rejects the idea that in general those with power should be trusted to correct themselves. Is there any reason why journalists (as opposed to government officials or corporate executives) can be expected to stop themselves from sometimes abusing power? If not, are there other ways to reconcile legal protections with public support?

An Unsettled Arena: Religion and the First Amendment

Ronald C. White Jr. is a scholar at the Huntington Library in San Marino, California, and a visiting professor at The School of Theology at Claremont and the University of California at Los Angeles.

By Ronald C. White Jr.

BRITISH AUTHOR G.K. CHESTERTON, while visiting this country in the first decade of this century, spoke of the United States as "a nation with a soul of a church." Like many foreign visitors he was trying to understand how a nation that had disestablished the churches at the birth of the nation could be marked by such religious vitality.

This creative tension of which Chesterton spoke is codified in what we know today as the First Amendment of the Bill of Rights. As people across the United States gather to celebrate the Bicentennial of the Bill of Rights, however, a most unsettled arena is religion and the First Amendment. Gathering dust at the beginning of this century as a memorial to a bygone era, today the First Amendment is the center of public controversy and scholarly debate. A variety of concerns—prayer in public schools, support of military chaplains, aid to parochial schools, tax exemptions, the teaching of creation, religious study clubs meeting in schools, and the role of religion in civic ceremonies—has excited passions and precipitated discussion in communities across the United States.

Our understanding of the meaning and intent of the First Amendment will be better informed if we remember the contours of establishment at the time of the American Revolution. In 1771, Thomas B. Chandler, an Anglican minister in New Jersey, wrote to Charles B. Chauncy, the venerable Boston Congregational leader, chiding him on continually changing the meaning of the word establishment. Chandler suggested that Chauncy publish a glossary wherein the different definitions of establishment might be explained.

Establishment of Churches in Colonial America

In Massachusetts and Connecticut people who had been dissenters in England established the Congregational church. Sometimes called a "theocracy" in older textbooks, in point of fact these Congregationalists often had to tread lightly both because of their experience with establishment in old England and their fear of Church of England interference in New England. In New York, the Church of England was established in five counties in the southern part of the colony, even though it was a minority church in terms of numbers. The Church of England was established also in Maryland, Virginia, the Carolinas and Georgia. Establishment in these southern colonies meant that all residents were taxed to support the established church, but office-holding was not confined to Anglicans. There were no established churches in the middle colonies of New Jersey, Pennsylvania, and Delaware. In New Hampshire the decentralized system that developed meant that local towns administered their own religious affairs.

Representative James Madison initiated discussion of amendments to the

Constitution before the House of Representatives on June 8, 1789. Originally the amendment on religion stood alone as one of 17 proposed amendments. In the process of debate the amendment on religion, which stood third in the original list, was enlarged to incorporate rights that had been part of other amendments.

Credit for the working of the religion portion of what became the First Amendment belongs entirely to Madison. The amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The "Establishment Clause"

The religion clause is seen to be, in effect, two clauses. The first clause—the so-called "establishment clause"—was meant to prevent the kind of dominance enjoyed by the Church of England in England. The lesson the English settlers had learned was that establishment did not deal simply with religious dominance, but went hand in hand with political dominance.

The understanding written between the lines of the establishment clause was the new possibility in the United States of parity between denominations. Thomas Jefferson, for example, was a member of the Anglican church in Virginia, but he recognized that it was unfair for the Church of England to have preference over Baptists and Presbyterians who were growing faster in number than the Anglicans. Under Jefferson's initiative, Virginia passed the Statute of Religious Freedom in 1786. Jefferson considered this act so important that he left instructions that it be one of three accomplishments to be mentioned in his epitaph. The new possibility that Jefferson and others imagined meant that no one denomination would be granted preference over any other, but that multiple denominations would grow up together in the new nation.

The "Free Exercise Clause"

The second clause—the so-called "free exercise clause"—seems to be cast in the negative also, but its intention is wholly positive. It was meant to balance the pronouncement on disestablishment. The movement for disestablishment presumed the free exercise of religion. The continuing vitality of religion in American society was taken for granted. The religion at that time was overwhelmingly Protestant or Evangelical (the words were used almost interchangeably through the 19th century). Even those founders of the American experiment who were deist, such as Jefferson, appreciated Christianity because of the agreed upon need for a religious basis for ethics and morals in society.

For the next 150 years the religion clauses of the First Amendment were allowed to recede into the honored past. By the 20th century the free exercise of religion now included the largest church in the United States, the Roman Catholic Church, as well as a vital Jewish community. Will Herberg's book, *Protestant-Catholic-Jew*, published in 1955, attracted much attention with his argument for the new pluriformity of American religion. In actual fact the plurality of American religion was both much broader and older than Herberg's thesis.

An important constitutional development helped bring the First Amendment back into the mainstream of American life. In a case in 1940, *Cantwell v. Connecticut*, the Supreme Court invoked the Fourteenth Amendment (1868) for the first time in interpreting the First Amendment religious clauses. The Court

incorporated the free exercise clause of the First Amendment into the clause of the Fourteenth Amendment, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," in upholding the right of Jehovah's Witnesses to propagate their faith door to door.

Seven years later in *Everson v. Board of Education* (1947), the Supreme Court incorporated the establishment clause in ruling that parents of parochial as well as public school children should be reimbursed for fares spent in transportation to school. After 150 years, the clauses on religion were now applied to the states in two landmark cases.

In recent years more and more cases have come forward to the Supreme Court on such diverse matters as aid to parochial schools, Bible reading and prayer in public schools, and Christmas nativity scenes and Hanukkah menorahs on public property. The direction of the courts in these diverse issues is to limit traditional practices, but the rulings as yet leave no clear pattern of the interpretation of the First Amendment.

For example, in 1963, in *Abington School District v. Schempp*, the Supreme Court outlawed the long-standing practice in Pennsylvania schools of reading ten verses from the Bible. In 1985, the courts extended their rulings in *Wallace v. Jaffree* by refusing to permit a moment of meditation or silent prayer in public school. Many believed that the court might sustain the possibility of silent mediation if there was no reference to prayer. This question was brought to the Supreme Court in 1987 in *Karcher, Speaker of the New Jersey General Assembly, et al. v. May et al.*, but the Court refused to rule because the persons who brought the suit had subsequently lost their offices and their successors withdrew the appeal. This issue still awaits a test case. It is a safe prediction that many new cases involving the relationship of church and state will be heard in the coming years.

Shaping the Debate on Religious Issues

It is not easy to classify the various sides in the debates over religion and the First Amendment. On the one hand, there are those, sometimes called strict separationists who argue that the First Amendment calls for an absolute separation of church and state. These individuals and groups say there should be no material support for private schools nor any possibility of religious instruction in public buildings. Separationists question tax exemptions for religious institutions.

On the other hand, there are those who are often called accommodationists. These persons and groups espouse a theory of government neutrality. Within this broad position Catholics and Protestants have been traditionally divided over the issue of aid to parochial schools. Recently, conservative Protestants and Catholics have sometimes sounded similar arguments in their concern about the intrusion of government into church matters and religious practices.

At the 200th anniversary of the Bill of Rights it is worth asking what will be the contours of debate in the unsettled arena of religion and the First Amendment in the next decade and century? Three factors among many are worth noting.

First, the United States of the 21st century will be infinitely more pluralistic than the new nation of the 18th century or even the nation of the 20th century. This pluralism is of many dimensions. Women, African-Americans and Native

Americans enjoy rights today not imagined in 1791. The expanding ethnic diversity in our society means that schools in Los Angeles teach children who collectively speak nearly 100 languages. The pluriformity of *Protestant-Catholic-Jew* has been expanded to include all of the world's religions and many who claim no religion at all. Today in the United States there are more Muslims than there are Congregationalists or Presbyterians, the two dominant churches in 1791. A challenge for the courts, churches, and all communities will be how to respect religious rights in the increasing pluralism in American society.

A second factor is the trajectory toward the privatization of religion. I would argue that this is an unintended result of disestablishment. The Founders of this nation assumed that religion was both a private and a public reality. The French writer Alexis de Toqueville, in his visit to the United States in the 1830s, likened religion in America to political parties in terms of their influence in the political and social life of the nation. Christian and Jewish groups understood themselves as fulfilling the prophetic role of their traditions in calling the nation to ideals of charity and social justice.

The trend of recent Supreme Court decisions has been to define religion in terms of its purely private role in society. Some see a clear implication in current court decisions that whenever the rights of religion and the rights of society are in conflict, religion is to give way. This understanding would turn a deaf ear to the rights of religious groups, such as the Amish or Jehovah's Witnesses, protected in earlier court decisions. It has been argued that this trend is the necessary consequence of the new pluralism. But some religious leaders, scholars, and lawyers wonder out loud whether this trend truncates the full meaning of religion clearly recognized by the Framers of the Bill of Rights.

A third factor is related to the second. If a previous concern was the intrusion of religion into the affairs of state, a contemporary concern is the intrusion of the state into the affairs of the churches. Should the posture of the courts be affirmation, neutrality or hostility toward the churches? In *Zorach v. Clauson* (1952), a case about release time for religious instruction, Justice William O. Douglas argued: "We find no constitutional requirement which makes it necessary for government to be hostile to religion." This sentiment seemed to prevail in *Wisconsin v. Yoder et al.* (1972), when the Court sustained the assertion of the Old Order Amish that compulsory school attendance interfered with the free exercise clause.

But in recent years many see a movement from neutrality to hostility. Thus in *Oregon v. Smith* (1990), the Supreme Court ruled against two drug counselors who had lost state benefits when they were fired for ingesting peyote, which was against state law. The drug counselors, two native Americans, appealed to the freedom of religion clause in the First Amendment. Many were alarmed when the Court seemed to say that where the rights of religion and the laws of the state are in conflict, religion will give way. A number of commentators have suggested that if the Old Order Amish case (*Wisconsin v. Yoder*) were to be tried today the verdict would be reversed. The question to be watched is whether *Oregon v. Smith* is a unique case or a portent of a further inroad of the state versus traditional religious practices.

Teaching Values in a Pluralistic Society

A concern that is beginning to unite religious groups is the question of how to teach values in society and in particular in the public schools. For the last two decades the specter of the religious right attempting to mandate their beliefs and values has kept mainstream Protestants, Catholics, and Jews wary of the problems of teaching values in a pluralistic society. But recently the vacuum of values in public and corporate life has forced religious leaders to reassess the need to communicate ethical and moral values. Schoolchildren today often read textbooks that underplay or neglect the religious foundation in the beliefs of our Founding Fathers and mothers as well as the beliefs of leaders such as Abraham Lincoln and Martin Luther King Jr. In this search for values, contemporary religious leaders are understanding what Madison and other Founders understood long ago: morality and ethics cannot endure without a religious foundation.

There are many other factors that will inform conversations and debates in the coming decade and century. This brief introduction is enough to suggest that religion and the First Amendment will continue to be an unsettled arena in coming years. It behooves each of us to try to understand and to appreciate the meaning and implication of the First Amendment.

Discussion:

Ronald White's essay sets current controversies about freedom of religion in historical context and speculates about the forms that these problems are likely to take in the future. At the time the Constitution was framed, Americans had had considerable experience with official state churches that were often supported by public taxation. According to Professor White, the intention behind the religion clauses of the First Amendment was to prevent the domination of any particular religion but not to separate religion from public life. For some 150 years, the religion clauses were understood to apply only against the national government and were not actively enforced. It was not until 1940 that the courts began the process of applying the free exercise and establishment clauses to the states. Thus the whole panoply of familiar protections—the restrictions on state aid to parochial education and on publicly sponsored nativity scenes, and so on—are modern innovations.

Today this history leaves us with two main approaches to the religion clauses: the older tradition finds its contemporary counterpart in the accommodationists who emphasize that government should be neutral among religions, and the newer tradition is represented by a philosophy of strict separation of church and state. Professor White identifies a number of trends that will test the wisdom of these two approaches in the future.

The trends identified by Professor White have caused some to conclude that legislatures should play a greater role in defining our religious freedoms. It is possible, for instance, that politically responsive institutions could keep up with changes in the number and types of religions and with the new problems created by the expanding array of private behaviors termed "religious." Thus, Congress recently enacted a statute imposing requirements on public schools for allowing some use of their facilities by religious groups; moreover, the Supreme Court has said that the appropriate place to accommodate religious freedoms and general criminal laws (such as prohibitions against peyote use) is the state legislature. Do you think this shift to the political arena is wise?

The alternative is to continue to rely on the judiciary, but some of Professor White's somewhat uneasy observations raise doubts about this possibility. Indeed, these observations provide a fascinating counterpoint to Professor Smolla's passionate account of the virtues of the kind of open society that is created by vigorous protection of rights.

Judicial efforts since 1940 to sever governmental connections to religion and to protect religious activities seem to correspond to the ideal of an unregulated marketplace of religious ideas. An open society, however, should lead to rich public debate and creative individual thought, yet Professor White notes a "vacuum of values in public and corporate life." Do you agree that public debate about moral values is deficient today? If so, is this deficiency a sign that openness is a defective ideal? Or that on religious matters our society is still not open enough?

The Second Amendment:

The Right to Bear Arms

Warren E. Burger, Chief Justice of the United States from 1969 to 1986, was appointed by President Reagan to serve as chairman of the Commission on the Bicentennial of the United States Constitution.

By WARREN E. BURGER

OUR METROPOLITAN CENTERS, and some suburban communities of America, are setting new records for homicides by handguns. Many of our large centers have up to 10 times the murder rate of all of Western Europe. In 1988, there were 9,000 handgun murders in America. Last year [1989], Washington, D.C., alone had more than 400 homicides—setting a new record for our capital.

The Constitution of the United States, in its Second Amendment, guarantees a "right of the people to keep and bear arms." However, the meaning of this clause cannot be understood except by looking to the purpose, the setting and the objectives of the draftsmen. The first 10 amendments—the Bill of Rights—were not drafted at Philadelphia in 1787; that document came two years later than the Constitution. Most of the states already had bills of rights, but the Constitution might not have been ratified in 1788 if the states had not had assurances that a national Bill of Rights would soon be added.

People of that day were apprehensive about the new "monster" national government presented to them, and this helps explain the language and purpose of the Second Amendment. A few lines after the First Amendment's guarantees—against "establishment of religion," "free exercise" of religion, "free speech and free press"—came a guarantee that grew out of the deep-seated fear of a "national" or "standing" army. The same First Congress that approved the right to keep and bear arms also limited the national army to 840 men; Congress in the Second Amendment then provided: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In the 1789 debate in Congress on James Madison's proposed Bill of Rights, Elbridge Gerry argued that a state militia was necessary "to prevent the establishment of a standing army, the bane of liberty . . . . Whenever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia in order to raise an army upon their ruins."

We see that the need for a state militia was the predicate of the "right" guaranteed; in short, it was declared "necessary" in order to have a state military force to protect the security of the state. That Second Amendment clause must be read as though the word "because" was the opening word of the guarantee. Today, of course, the "state militia" serves a very different purpose. A huge national defense establishment has taken over the role of the militia of 200 years ago.

Some have exploited these ancient concerns, blurring sporting guns—rifles, shotguns and even machine pistols—with all firearms, including what are now

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called "Saturday night specials." There is, of course, a great difference between sporting guns and handguns. Some regulation of handguns has long been accepted as imperative; laws relating to "concealed weapons" are common. That we may be "over-regulated" in some areas of life has never held us back from more regulation of automobiles, airplanes, motorboats and "concealed weapons."

The History of the Second Amendment

Let's look at the history.

First, many of the 3.5 million people living in the 13 original Colonies depended on wild game for food, and a good many of them required firearms for their defense from marauding Indians—and later from the French and English. Underlying all these needs was an important concept that each able-bodied man in each of the 13 independent states had to help or defend his state.

The early opposition to the idea of national or standing armies was maintained under the Articles of Confederation; that confederation had no standing army and wanted none. The state militia—essentially a part-time citizen army, as in Switzerland today—was the only kind of "army" they wanted. From the time of the Declaration of Independence through the victory in Yorktown in 1781, George Washington, as the commander-in-chief of these volunteer-militia armies, had to depend upon the states to send those volunteers.

When a company of New Jersey militia volunteers reported for duty to Washington at Valley Forge, the men initially declined to take an oath to "the United States," maintaining, "Our country is New Jersey." Massachusetts Bay men, Virginians and others felt the same way. To the American of the 18th century, his state was his country, and his freedom was defended by his militia.

The victory at Yorktown—and the ratification of the Bill of Rights a decade later—did not change people's attitudes about a national army. They had lived for years under the notion that each state would maintain its own military establishment, and the seaboard states had their own navies as well. These people and their fathers and grandfathers before them, remembered how monarchs had used standing armies to oppress their ancestors in Europe. Americans wanted no part of this. A state militia, like a rifle and powder horn, was as much a part of life as the automobile is today; pistols were largely for officers, aristocrats—and dueling.

Against this background, it was not surprising that the provision concerning firearms emerged in very simple terms with the significant predicate—basing the right on the necessity for a "well regulated militia," a state army.

In the two centuries since then—with two world wars and some lesser ones—it has become clear, sadly, that we have no choice but to maintain a standing national army while still maintaining a "militia" by way of the National Guard, which can be swiftly integrated into the national defense forces.

Americans also have a right to defend their homes, and we need not challenge that. Nor does anyone seriously question that the Constitution protects the right of hunters to own and keep fishing rods and other equipment for fishing—or to own automobiles. To "keep and bear arms" for hunting today is essentially a recreational activity and not an imperative of survival, as it was 200 years ago; "Saturday night specials" and machine guns are not recreational weapons and surely are as much in need of regulation as motor vehicles.

Americans should ask themselves a few questions. The Constitution does not

mention automobiles or motorboats, but the right to keep and own an automobile is beyond question; equally beyond question is the power of the state to regulate the purchase or the transfer of such a vehicle and the right to license the vehicle and the driver with reasonable standards. In some places, even a bicycle must be registered, as must some household dogs.

If we are to stop this mindless homicidal carnage, is it unreasonable:

1) to provide that, to acquire a firearm, an application be made reciting age, residence, employment and any prior criminal convictions?

2) to require that this application lie on the table for 10 days (absent a showing for urgent need) before the license would be issued?

3) that the transfer of a firearm be made essentially as with that of a motor vehicle?

4) to have a "ballistic fingerprint" of the firearm made by the manufacturer and filed with the license record so that, if a bullet is found in a victim's body, law enforcement might be helped in finding the culprit?

These are the kind of questions the American people must answer if we are to preserve the "domestic tranquility" promised in the Constitution.

Discussion:

Former Chief Justice Burger contrasts the historical context of the Second Amendment with our present day circumstances and concludes that reasonable regulation of firearms is appropriate. At the time the Bill of Rights was drafted, a major concern was to contain the new "'monster' national government." State militias were seen as one method to accomplish this. Moreover, at the time, firearms had a far different place in society than they do today; many people depended on wild game for food, and men were expected to be ready to participate in volunteer-militia armies. Today, guns are used mainly for private recreation and their misuse has created shocking amounts of violence and crime.

The former chief justice notes that, although automobiles are wildly regulated, "the right to keep and own an automobile is beyond question." He suggests that in the same way, the basic right to keep a firearm to defend your home would not be jeopardized by reasonable rules on sales and recordkeeping. This interesting observation could be extended. For example, private property is generally subject to widespread restrictions in the form of zoning laws, taxation, safety requirements, and so on. Yet the basic right to hold private property is certainly widespread and solidly-protected in the United States. Does this suggest that other rights—such as free speech or religion—could be subject to government restrictions and still remain basically secure? If you don't think so, why not?

The approval in this essay of reasonable regulation of the right to bear arms contrasts sharply with the positions taken in several of the essays, where authors call for vigorous expansion and strict protection of other provisions in the Bill of Rights. The difference in treatment cannot be fully explained by the restricted original purpose of the Second Amendment; Morton Halperin's essay, for instance, acknowledges that the original purpose of the free speech clause was narrower than its modern function, and Ronald White's contribution shows that modern interpretations of the establishment clause go considerably beyond its original objective. Can you justify approving of broad interpretations of most of the Bill of Rights while supporting a narrow interpretation of the right to bear arms? To be sure, there are problems and abuses associated with firearms. But Professor Smolla acknowledges that unrestricted speech (in the form of obscenity and racial insults) can cause serious problems, too, and Professor White suggests that some establishment clause cases may have helped to impoverish our moral discourse. Perhaps, the difference is, as the former chief justice implies, that the right to bear arms today is mainly recreational and therefore is not related to important values. Do you agree? Are there any ways in which the right to bear arms might serve significant political or personal values?

The Fourth Amendment, Privacy, and Modern Technology: A Time for Reassessment

George B. Trubow is director of the Center for Informatics Law and a professor of law at The John Marshall Law School in Chicago.

By George B. Trubow

NEW INFORMATION and communications technology has revolutionized the process of gathering, storing, manipulating, retrieving, and transmitting information. There is no need here to belabor the awesome capabilities of modern information processing, but there is need to examine how the new technology threatens personal privacy, in constitutional terms, and whether the Fourth Amendment, as it has been interpreted, is sufficient to the challenge.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[1]

For 200 years this amendment has stood as a barrier between an individual's privacy and certain unwarranted encroachments of government. True enough, the Constitution itself does not mention privacy specifically, which ought not be a surprise because two centuries ago no right of "privacy" existed in England to describe a legally protected interest, and of course that was the wellspring of our common law. To this day that word is not used in England to describe those interests that we recognize as privacy but are protected under other categories of rights.[2]

The celebrated *Harvard Law Review* article by Samuel Warren and Louis Brandeis in 1890 is recognized as the font of privacy in our country.[3] Their idea that privacy interests connected with personal information and the individual was accepted as a doctrine of our common law of tort, or established by statute; the notion finally received constitutional recognition in the 1965 case of *Griswold v. Connecticut*.[4] (That case, with its "penumbra" of privacy, is thoroughly discussed in Robert Peck's paper on the Ninth Amendment.) The Fourth Amendment is also a principal source of the privacy interest that emanates from the Constitution, certainly with respect to the confidentiality of information. The Bicentennial of the Bill of Rights is indeed a fitting occasion to examine the Fourth Amendment's privacy implications in light of today's incredible technology. This paper is concerned with Fourth Amendment limitations on the search of automated data bases.[5]

Protecting the security of papers and records was a much different activity in 1791, well before the advent of telephones, computers, and the wide array of surveillance devices. There were no sophisticated data bases maintained by government or private enterprise that held vast quantities of personal information

about citizens or clients. Almost all of the information pertaining to an individual would have been stored in his home or place of business, well within his exclusive control. In such an environment it is also not surprising that "searches" for Fourth Amendment purposes required some sort of "trespass" or penetration into a physical area belonging to or under the control of the aggrieved party.[6]

It was not until the case of *Katz v. U.S.* (1967),[7] that a collision between privacy and technology required another look at the trespass notion. In that case the plaintiff's end of a conversation in a public telephone booth was recorded by a device the FBI had affixed to the outside of the booth. The FBI claimed that it had not "searched" since plaintiff was in a glass-panelled public telephone booth that FBI agents had not entered. Noting that the Constitution "protects people, not places,"[8] the Supreme Court held that areas wherein the individual had a "justifiable expectation of privacy" are protected from government intrusion.

"One who shuts the door behind him, and .... place[s] a call is surely entitled to assume that the words he utters ... will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."[9]

In *Katz* the court recognized the role of new technology in the field of communications. What relevance might this have to information processing technology?

The Electronic Funds Transfer System

As the example of what soon will be the norm in everyday consumer transactions as well as for large-scale business enterprise, consider the "checkless, cashless society" of the electronic funds transfers system (EFT). When point-of-sale EFT is implemented, at the time of purchase when the buyer's EFT card is used, the buyer's bank account is automatically debited and the seller's account is credited for the amount of the purchase. In the typical transaction today when the purchaser presents his charge card, a voucher slip is generated, just another kind of negotiable instrument which must be routed to the credit service, which then bills the customer, usually on a monthly basis. But with EFT the exchange of "electronic money" takes place instantly and the need for cash or checks has been eliminated.

Anyone who has recently shopped at a supermarket has seen the front end of EFT. The groceries at the checkout counter are passed over the optical scanner that automatically translates the uniform product code stamped on the goods into a description and price that appears on the register monitor and on the receipt given to the buyer. The same data are stored in the computer system to which the checkout register is really a terminal. Not only are these data important for inventory control, but many stores are using such information to analyze their customers' buying habits for the purpose of target-marketing strategies. And, of course, this information is important for audit control in connection with EFT, for if this were an EFT purchase the grocer's account would be credited with the purchase price at the same instant the funds are transferred from the buyer's account.

Imagine, then, the total EFT environment. The EFT number will be used for every purchase—transportation, hotel accommodations, dinner, theater, subscriptions, memberships, and much, much more. Some jurisdictions now even

collect traffic fines through credit cards—can EFT be far behind? All this activity leaves behind an actual minute-by-minute description of what the buyer is doing and where he is doing it. The EFT receipt notes the date and time of the transaction, as well as the location by store and register. Thus, someone scanning a purchaser's transactions could maintain constant surveillance of his whereabouts—often to within a few feet of where the subject actually is standing at a given moment.

To what extent may government examine those computer files without the constraints of the Fourth Amendment? Certainly, in the future of EFT, detective work will be made much easier and an exhaustive "search" of minutely detailed electronic records stored anywhere could be accomplished through use of a modem-equipped computer terminal located anywhere else. How is such a scenario addressed in current constitutional law?

Confidentiality of Records

When the object of a search is records, it has long been clear that it is the information in those records that is the subject of Fourth Amendment protection—and not simply the medium upon which the information is recorded.[10] Regarding the confidentiality of records, however, the court has been strangely inconsistent in evaluating the privacy expectations of the subjects of that information. Consider telephone records. In *Smith v. Maryland* (1979),[11] the Supreme Court held that, as regards the Fourth Amendment, a telephone subscriber had no reasonable expectation of privacy regarding the telephone numbers that he dialed. The Court reasoned that because the customer voluntarily disclosed to the telephone company the called number for the purpose of allowing the proper electrical connection to be made, that a privacy expectation was defeated. Certainly, the customer has no choice, if he is to use the telephone, but to dial the desired number. To draw a distinction between the conversation in *Katz* and the dialed number in *Smith* seems to make little sense.

The Court reached a similar conclusion in connection with bank records. In the case of *United States v. Miller* (1976),[12] it was held that a bank customer has no reasonable expectation regarding the privacy of records of his account. The reasoning was that since the customer writes checks he knows will be viewed and processed by the bank's employees that there is no expectation of confidentiality of the records of those transactions. State supreme courts have reached contrary results regarding privacy expectations in those same situations (e.g., New Jersey on telephone records in *State v. Hunt*[13] and California on bank records in *Burrows v. Superior Court*[14]) with reasoning that seems far more consistent with what the typical customer might expect. Indeed, with respect to the *Miller* case the Congress was in such disagreement with the Court that it passed legislation specifically recognizing the customer's privacy rights against federal inquiries regarding his bank records.[15]

Access to Electronic Records

On the other hand, when specifically addressing computer data banks, the Court has indicated an appreciation of the potential for privacy abuse from such technology more in keeping with its sentiments in *Katz*. In *Whalen v. Roe* (1977),[16] the Court was concerned about government access to records in a drug abuse treatment program. Though not finding government impropriety in that case, the Court said: "We are not unaware of the threat to privacy implicit in the

accumulation of vast amounts of personal information in computerized databanks and other massive files. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."[17]

In his concurring opinion in *Whalen,* Justice Brennan emphasized that data in electronic form "vastly increases the potential for abuse of that information."[18]

Even more insightful with respect to the new information technology is the opinion in the case of *United States Department of Justice v. Reporters Committee for Freedom of the Press*[19] (1989). That case involved a FOIA request for access to automated criminal history "rap sheets" maintained by the FBI.[20] In denying the request, the Supreme Court said that because the various pieces of criminal history information had been compiled into a dossier by electronic collation, that the assembled profile had a special privacy value. The Court supported the privacy interest in this data even though the various items of information in the rap sheet are themselves of public record at the law enforcement agency by which they were supplied. The opinion by Justice Stevens stated that: "[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[21]

Surely, *Reporters Committee* deals with a FOIA request and is limited in scope to that subject. Nevertheless, the issue was whether such a database represented a privacy interest, and the Court's 9-0 opinion was absolutely clear on that point. What is the difference in analysis regarding the rap sheet, a record of official actions by law enforcement agencies, and bank records, the account of personal financial transactions? It would seem intuitively that the latter has a clearly better stance as reflecting a privacy interest, though the Court thought not.

Miller involved a governmental examination of a data subject's records held by a private third party, and the justification of the government's search without a warrant was at issue. In *Reporters Committee,* a third party requested government-held information concerning a data subject that the government had refused to disclose. In each case the Court upheld the government's action, though surely that ought not to be the reason for so poorly assessing privacy interests of the data subject.

The results in *Miller* and *Smith* are explained on an analysis of risks of further disclosure resulting from the customer's voluntary actions. The case said that because the customer voluntarily wrote a check which he knew the bank employees would see, or disclosed to the phone company the number he was dialing, that he took the risk of further disclosures by those service providers. Indeed, in *Miller* the Court emphasized that because the customer had "neither ownership nor possession" of the records that the Fourth Amendment did not apply, though as was pointed out earlier, in *Katz* the Court had specifically rejected the trespass notion as being a requirement for Fourth Amendment application.

The Threat of "Caller ID"

Additionally, for the Court now to ignore the realities of modern technology—as it refused to do in *Katz*—will give the government virtually unchecked access to records and information in the hands of countless third parties. Aside from the ability of the government to initiate a records search, there is also the

baleful threat of "caller ID," (CID) the new telephone technology whereby the calling number can be displayed on the called party's monitor. This technology is subject to wide debate today as telephone companies across the nation are applying to state public utilities boards for permission to sell such service to customers.

The battleground of CID has focused on the competing privacy interests of the called party as against the calling party. The major privacy threat of CID comes not simply from disclosure of the calling number, however, but from the information about the calling *party* that could be assembled and forwarded.

CID makes possible the marshalling of far more information than merely a phone number. The calling number is associated with an address and the name of the subscriber, and that is undoubtedly backed up by a Social Security number (SSN)—which has become a *de facto* universal identifier mandated by the federal government. The SSN permits data bases everywhere to be queried or linked by reference to that number. What if federal or state government were to utilize CID, ordering up information on calling parties by searching private sector records about them and compiling new government records, simply because someone has called a particular federal agency? Though under the rationale and policy of *Katz* and *Reporters Committee* one could well argue that such a search would be violative of the Fourth Amendment, *Smith* and *Miller* would seem to pose no impediment to such government snooping. After all, the information searched probably comes from a file to which the data subject contributed "voluntarily," if indeed one has any volition at all regarding the use of bank accounts, charge cards, or telephones in today's economy and society.

Electronic Mail

And what about the burgeoning networks of communication systems crisscrossing this continent and the planet? Electronic mail (EM) is a phenomenon of the present wherein the sender may route his message to the recipient through a "mail box" residing in a host computer maintained by a third party. EM is often an adjunct to electronic bulletin board systems (EBB) that allow participants to communicate with one another in open discussions that anyone who calls in can view. EM permits individuals using these systems to leave private messages directed to other specified users; EM messages can also be read by the computer system operator who supervises and monitors the system functions. An action has been filed in California by employees who discovered that their employer, who operated such an EM network, routinely reviewed mail exchanged between employees.[22] Elsewhere, a city's mayor stirred controversy because he looked at EM exchanged between city council members.[23] In each case, the argument is made that because the users were communicating over a system owned and operated by a third party that they had no justified privacy expectation regarding the contents of their messages.[24]

With respect to the federal postal service, it has always been understood that although addresses and other information on an envelope are open to view, the contents of first class mail is private and protected by the Fourth Amendment. Under the *Miller* case rationale, however, it appears that EM would not be protected by the Fourth Amendment because neither the sender nor the recipient of a message may own or control the communication system.

Time will tell what the current Supreme Court will do in confronting the

challenges of information technology. Whether the computer revolution will be allowed to destroy what the American Revolution won for us remains to be seen. Congressional action, at the very least, may shore up some privacy interests. Perhaps an amended Fourth Amendment will be required, though such a route is one that this writer shudders to contemplate. That route, however, will be preferable simply to sacrificing Fourth Amendment protection in the interests of information processing efficiency. ❦

1. U.S. Const. Amend. IV.
2. For a discussion of the treatment of privacy rights in England see Buchanan, *A Comparative Analysis of Name and Likeness Rights in the United States and England*, 18 Golden Gate U.L. Rev. 301 (1988).
3. Warren & Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).
4. 381 U.S. 479 (1965). For a detailed discussion of the *Griswold* decision see L. Tribe, *American Constitutional Law* 11-3 at 570-71 (1978).
5. Surveillance through the use of tracking devices has raised some interesting questions, but that kind of search is not the subject of this paper. For a discussion of the Fourth Amendment implications of tracking devices see *United States v. Karo*, 468 U.S. 705 (1984).
6. See *Olmstead v. U.S.*, 277 U.S. 438, 457 (absence of physical penetration into private area precluded Fourth Amendment recovery) (rev'd *Katz v. U.S.*, 389 U.S. 347 (1967)).
7. 389 U.S. 347, 361 (1967).
8. *Id.* at 353.
9. *Id.* at 352.
10. See, e.g. *California v. Greenwood*, 486 U.S. 35 (1988) ("so long as a package is 'closed against inspection,' the Fourth Amendment protects its *contents*") (emphasis added); *United States v. Karo*, 468 U.S. 276 (1984) (Fourth Amendment not implicated unless authorities use *information* concerning expectation of privacy) (emphasis added).
11. 442 U.S. 735 (1979).
12. 425 U.S. 435 (1976).
13. 91 N.J. 338, 346-7, 450 A.2d 952, 956 (1982) (telephone subscriber "is entitled to assume that the numbers he dials in the privacy of his own home will be recorded solely for the telephone company's business purposes").
14. 13 Cal. 3d 238, 529 P.2d 590 (1974).
15. The decision in *United States v. Miller*, 425 U.S. 435 (1976), prompted Congress to enact The Right to Financial Privacy Act of 1978 (RFPA), 12. U.S.C. s. 3401 (1978). RFPA provides bank customers with limited privacy rights in disclosure of their bank records. For a detailed discussion of RFPA and the *Miller* decision see Trubow, *Privacy Law and Practice*, para. 3.04(3) (1988).
16. 429 U.S. 589 (1977).
17. *Id.* at 605.
18. *Id.*
19. 109 S.Ct. 1468 (1989).
20. *Id.*
21. *Id.* at 1477.
22. Caldwell, "Big Brother Is Watching," *Information Week*, June 18, 1990, at 34.
23. *Id.*
24. "Big Brother in the Water Cooler," *Washington Times*, Sept. 12, 1990.

Discussion:

George Trubow describes the amazing capacities of modern technology for processing and storing information about our daily lives. Systems for the electronic transfer of funds can, for example, record where we have been and what we have purchased; this provides the potential for "constant surveillance." Professor Trubow analyzes current Fourth Amendment cases and comes to the conclusion that the Court has not yet provided sufficient protection against invasions of privacy through modern technology.

The main weakness in the Court's approach, according to this essay, is that in determining whether a "justified expectation of privacy" exists, the Court has been greatly influenced by whether the information has been voluntarily disclosed to a third party. Thus, because financial information is voluntarily exposed to bank employees, the Court determined that bank records are not entitled to Fourth Amendment protec-

tions. Since many of the new information technologies involve the amassing of information by organizations to whom the information was voluntarily given, present interpretations "will give the government virtually unchecked access to records and information...."

Professor Trubow does, however, see some brighter possibilities. For instance, Congress enacted legislation to protect the confidentiality of bank records. Moreover, the Court itself sometimes shows a realistic understanding of modern technology. For example, it denied a freedom of information request for the disclosure of computerized criminal "rap sheets." Although the information was all from public sources, the Court recognized the danger inherent in "a computerized summary located in a single clearinghouse...."

Notice how Professor Trubow's concerns about privacy can contradict Dr. Halperin's argument that we need unrestricted access to information for First Amendment purposes. The denial of information contained in "rap sheets" prevented the public from getting quick access to large amounts of potentially important information. Which do you think is the greater danger—that the public will learn too much or that it will learn too little?

Obviously, prosecution of criminal cases will be impeded if Fourth Amendment protections make access to computerized information difficult. If extending Fourth Amendment protections to telephone dialing records created serious obstacles to convicting major organized crime figures, would the gains for privacy be worth their costs?

In discussing this question it might be worth considering more fully the nature of the privacy interest at stake. Traditionally, "privacy" involves shielding information that is personal—such as the contents of a telephone call or a diary. But this essay is concerned with the electronic collection of information that in a sense is already public. A computerized "minute-by-minute description of what a buyer is purchasing and where he is purchasing it" sounds sinister, but it is only a record of behavior that takes place in public streets and stores. Technology does increase the amount, accuracy, and speed of the information that is available, but some would say that the sort of knowledge thus made available has long existed among neighbors living in small towns. What exactly is so troubling about the possibility of ready access to relatively complete information about a person's public activities?

The Fourth Amendment:

The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects

Yale Kamisar, the Henry K. Ransom Professor of Law at the University of Michigan, is a leading commentator on constitutional law and criminal procedure

By Yale Kamisar

THREE QUARTERS OF A CENTURY ago, the Supreme Court expressed some thoughts on constitutional interpretation that bear repeating today *(Weems v. United States):*

> Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. . . . [In interpreting] a constitution, therefore, our contemplation cannot be only of what has been but what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power.

The Fourth Amendment protects "the right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" and bans the issuance of warrants except upon "probable cause" and certain other conditions. The wording of the amendment is succinct and majestic. But it is also vague and general. Thus, whether, and how, to apply it to new conditions has generated great controversy—and none greater than the current agitation over mass drug testing.

Electronic Surveillance

Until recently, the best illustration of the struggle to adapt the search and seizure provision to new developments was the Court's confrontation with the troublesome problem of wiretapping and electronic eavesdropping. In *Olmstead v. United States* (1928), the first wiretapping case to reach the Supreme Court, a 5-4 majority, per Chief Justice Taft, concluded, over the famous dissents of Holmes and Brandeis, that so long as electronic surveillance did not involve a physical entry into one's home or office it fell outside the coverage of the Fourth Amendment. Conversations, reasoned Taft, were not "things" to be "seized" within the meaning of the amendment.

In the following years, as parabolic microphones and other forms of sophisticated electronic snooping made their presence felt, it became increasingly clear that the property-trespass theory of the Fourth Amendment could not survive. The Warren Court finally rejected it in the 1967 *Katz* case. The Fourth Amendment, the Court told us, "protects people, not places"; the amendment applies whenever the government violates a person's "justifiable" expectation of privacy or one that society is prepared to recognize as "reasonable."

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But that was not the end of the matter. Once tapping and bugging were deemed "searches" or "seizures," were they so inherently intrusive and indiscriminate that they were necessarily *unreasonable* ones? The Court answered in the negative. If the Taft Court had read the Fourth Amendment too literally, to maintain that conversations were beyond the reach of any warrant or court order would be to display little more sophistication.

Privacy and Random Drug Testing

Today it is hard to believe that the Supreme Court struggled so long and so hard to bring electronic surveillance within the ambit and the terms of the Fourth Amendment. For the constitutional problems posed by such surveillance, although not inconsiderable, pale in comparison with those raised by mass or random drug testing. Indeed, some day, we may look back on such testing as either the most dramatic illustration of the application of the Fourth Amendment to new conditions and purposes or the most striking example of the failure to do so.

In 1986, President Reagan issued an executive order calling for a "drug-free federal workplace," an order requiring each executive agency to set up a program to test all job applicants and current employees in "sensitive positions." A growing number of state and local agencies have also instituted urinalysis screening. (So have many of the largest private employees, but they need not satisfy Fourth Amendment requirements because the Amendment only restricts government officials. However, government involvement in private conduct may make that conduct "state action.")

These developments have put enormous pressure on the Fourth Amendment. Very few people (and perhaps not too many judges) will worry about losses of privacy when the government claims that such losses are "necessary" in order to win "the war against drugs."

Questions have been raised about the need for, and the accuracy of, mass drug testing. But even if the courts are convinced that mandatory warrantless and suspicionless testing is an effective means of achieving an important public objective, effectiveness alone is not a sufficient justification for a legal search. As one federal judge recently noted: "There is no doubt about it—searches and seizures can yield a wealth of information useful to the searchers. (That is why King George III's men so frequently searched the Colonists.) That potential, however, does not make [a governmental search] a constitutionally reasonable one."

In 1989, the constitutionality of drug testing finally reached the U.S. Supreme Court. That year, in companion cases, *National Treasury Employees Union v. Von Raab* (5-4) and *Skinner v. Railway Labor Executives Association* (7-2), the Court upheld the constitutionality of two drug-testing programs that predated the president's executive order.

The contention that state-mandated urinalysis is neither a "search" or "seizure" because it does not entail a physical invasion, or even a touching, of the body might have prevailed in the Taft Court era, but it was quickly dismissed, and rightly so, by the current Supreme Court: Urinalysis is covered by the Fourth Amendment because one has a reasonable and legitimate expectation of privacy in the personal information contained in one's bodily fluids. Moreover, a urine test will often be conducted under the close surveillance of a government representa-

tive, an embarrassing, if not a humiliating, experience.

Nevertheless, the Court rejected the challenges to each testing program. But the *Skinner* and *Von Raab* cases are hardly the last word on the subject. Because the drug-testing plans at issue in each case were heavily circumscribed, the fate of other programs less restricted in scope is unclear. The principles lurking in this area will have to await shaping and clarification in future cases.

At issue in the *Skinner* case were federal regulations requiring railroad employees involved in train accidents to submit to alcohol and drug tests and permitting railroads to administer breath or urine tests to employees who violated certain safety rules. *Von Raab*, the companion case, dealt with provisions of a customs service plan that required drug testing of employees who sought transfer or promotion to positions that directly involve the interdiction of illegal drugs or that require the carrying of firearms.

In upholding both programs, although neither required a warrant nor any individualized suspicion of wrongdoing, the Court, speaking through newly appointed Justice Anthony Kennedy, utilized a general "reasonableness" test or a general "balancing" approach. Because neither program was designed to serve ordinary law enforcement needs (or, to put it somewhat differently, each program presented special governmental needs beyond the normal needs of law enforcement), the Court deemed departure from the usual Fourth Amendment requirements justified and a general balancing of individual privacy expectations against the government's interests appropriate.

That the government's interests prevailed in both cases—the Court concluded that traditional Fourth Amendment safeguards were "impractical" in these settings—is hardly surprising. This is usually the result when the Court utilizes what the dissenters aptly called "a formless and unguided 'reasonableness' balancing inquiry."

Von Raab is the more significant, and more troublesome, case of the two. Although it can be read narrowly (if one strains a bit) it also can be read broadly as resting on nothing more than the government's abstract interest in the "integrity and judgment" of its employees. (Of 3,600 Customs Service employees tested, only five tested positive for drugs; the commissioner of customs himself had stated that the service was largely drug-free.) Moreover, unlike the program sustained in *Skinner*, the Customs Service testing plan did not require predicate circumstances that at least raise some suspicion about the government employees to be tested.

Justice Antonin Scalia joined the majority in *Skinner*, but dissented in *Von Raab*. There is much force in his argument that the only plausible explanation for the Customs Service drug-testing program was "symbolism"—to show that the service is "clean" and that the government is serious about its war on drugs. As Justice Scalia emphasized, however, "the impairment of individual liberties cannot be the means of making a point"; "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."

After reading the opinion of the Court in *Von Raab*, one cannot help but ask: What happened to the Fourth Amendment? In light of the text and history of the amendment, how can the Court sustain searches conducted without a war-

rant and in the absence of "probable cause"—indeed, in the absence of any level of individualized suspicion? If drug testing is a "search" (and the Court was quick to recognize that it is) and if individuals do not lose their Fourth Amendment rights merely because they work for the government (and the Court has assured us that they do not), how can any public employee be tested without any suspicion particular to him simply because he is a member of a group that includes some who do use drugs? After all, no court ever has, or would, approve a "dragnet" or "blanket" search of all people in a particular neighborhood, even one in a high crime neighborhood, on the rationale that such a police operation would turn up evidence of criminal conduct on the part of some people—as undoubtedly it would.

But the matter is more complicated than that. Although the Supreme Court has not specifically addressed these questions, the lower federal courts have consistently upheld what might be called "dragnet searches" of boarding passengers and their carry-on luggage at airport gates, and what might be characterized as "blanket" metal detector searches and inspections of briefcases and parcels at the doors of courthouses and other governmental buildings. Moreover, a year after the drug-testing cases, in *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint operation, whereby police stationed at a DWI roadblock stopped every approaching vehicle. How can these "mass, suspicionless investigations" be squared with the Fourth Amendment?

The answer is that in the last quarter-century the Court has viewed the Fourth Amendment as a flexible standard that permits fairly wide-open balancing of public and individual interests when government programs are directed at special problems unlike those confronted by the police in their day-to-day pursuit of criminals. In these instances (originally inspection of residential and commercial buildings for possible violations of health, safety and sanitation standards) the Court has carved out an exception to traditional Fourth Amendment constraints for what have been variously called "inspections," "regulatory searches" or "administrative searches." The essence of this exception is that searches not conducted as a part of a typical police investigation to secure evidence of crime but as part of a general regulatory scheme (one applying standardized procedures negating the potential for arbitrariness) need not be based on individualized suspicion or, sometimes, be authorized by warrants.

The Administrative Search Concept

It should not be forgotten, however, that the "administrative search" exception to traditional search and seizure safeguards was, at its inception, a narrow one. Most housing code violations occur within private premises and cannot be detected from the outside. Thus, if housing code violations required individualized suspicion, such inspections might not be possible at all. Moreover, unlike drug testing, housing code inspections, as the Court emphasized at the time, were not "personal in nature" because they focused on heating, plumbing and wiring rather than on evidence of the occupant's activities.

Airport and courthouse searches also can be justified as "administrative searches," but these precedents, too, can be read narrowly. Courthouse searches were a response to the bombing of government buildings; airport searches were a response to a dramatic escalation of skyjacking and air piracy—crimes which

exceed all others in terms of the potential for enormous and immediate harm.

Moreover, airport searches present the government with a "now-or-never opportunity"—the individual passing the checkpoint is in but momentary contact with the government and thus even a reasonable suspicion requirement would be unworkable. This, of course, is not so as to the ongoing supervision of government employees. Finally, a metal detector search constitutes a minimal intrusion, certainly a much more limited one than the forced discharge of bodily fluids.

This is why, as a general proposition, on-the-job random drug testing should not be imposed absent a clear showing that a process of close supervision of employees plus testing upon some particularized suspicion (a less demanding standard than "probable cause") produces unacceptable results.

The serviceability of the administrative search concept has gladdened government lawyers, but has alarmed others, including me. "Administrative search" is swarming around the Fourth Amendment like bees. And the drone may soon become deafening.

I agree with the University of Illinois' Wayne LaFave, author of the leading treatise on search and seizure, who recently told me: "Unless the administrative search is limited to truly extraordinary situations where rigorous application of typical Fourth Amendment standards would be *intolerable*, would lead to unacceptably poor results, the amendment—as we thought we knew it—will largely disappear. The need to detect drug users is important, but hardly more so than the need to search for narcotics dealers, kidnappers and murderers. Yet we have never demanded 100 percent enforcement of the criminal law, or anything approaching it. Instead, we are committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive state."

As indicated earlier, because the particular testing program upheld in *Von Raab* was heavily circumscribed, the case can be read narrowly. But I think such a reading would be an unrealistic one. *Von Raab* probably means at least this much: Concerns about public safety are sufficiently compelling to justify warrant*less*, suspicion*less* drug testing of various categories of law enforcement and corrections officers and also certain categories of other public employees whose impaired faculties would pose a clear and present danger to the public safety of co-workers or the general public.

Such an approach carries a considerable distance, but at least it has a stopping point. I do not believe the same can be said for the argument—one made by the government in *Von Raab* and in a goodly number of other cases—that the need to maintain the "integrity" and the "public image" of various government agencies and their employees also justifies suspicion*less* drug testing.

If such an argument prevails—if mass, random drug testing may rest simply on the premise that government employees serve as "role models"—the liberty and privacy of millions of federal, state and city workers, regardless of the nature of their jobs, will be significantly diminished. Nor is that all. What about lawyers, doctors and accountants? Aren't *we all* role models?

Judge (later Supreme Court Justice) Benjamin Cardozo once observed that "the great tides and currents which engulf the rest of men do not turn judges by." The drug-testing cases illustrate his point. The danger today is that judges will be unduly influenced by contemporary tides and currents—so much so that these

forces may engulf the Fourth Amendment itself.

The "individualized suspicion" concept is the heart of the Fourth Amendment. However great the threat posed by illicit drug use, that concept must be preserved. It must remain the rule, not the exception.

The *Von Raab* majority spoke of "a national crisis in law enforcement" caused by the drug problem. But we should greet claims of "crisis" or "emergency" or "necessity" with considerable skepticism. For such slogans can be—and have been—a free people's most effective tranquilizers. As we mark the 200th anniversary of the ratification of the Bill of Rights, we would do well to remember that.❦

Discussion:

In general the Fourth Amendment requires that the government obtain a warrant before it conducts searches, and warrants are usually issued only if there is some specific reason to suspect wrongdoing. Yale Kamisar shows how the Supreme Court has adapted these protections to modern life by defining "searches" to include wiretapping and other invasions of privacy. The courts, however, have also allowed searches without any "individualized suspicion" in certain non-criminal settings, such as housing inspections. Recently, this "administrative search" exception has been extended to permit suspicionless drug testing of railroad employees and federal drug agents. Professor Kamisar sees this development as having fundamental importance; indeed, he fears that unless this trend is reversed, the Fourth Amendment as we know it "will largely disappear."

Why are the drug-testing cases so ominous? Professor Kamisar emphasizes several considerations. The Court has increasingly employed a general balancing test, which is vague and provides little support for restricting the government's power to search when (as is nearly always the case) important information might be discovered. Moreover, the Court may have accepted the idea that the government's interest in the symbolism of having a drug-free workforce is sufficiently important to justify random testing. Since we are all potentially "role models," this justification would permit random testing of virtually all government employees, indeed all members of the legal and medical professions. Finally, a crisis-mentality about narcotic use further diminishes the incentives for preserving the older, more protective understanding of the Fourth Amendment.

As you read this essay, ask yourself whether you should be frightened by the legal developments that are described. It does not seem all that threatening for the government to require that its drug agents and those who are responsible for railroad safety be drug-free. However, it is true that in a sense we are all role models, so that the principle in those cases could readily be extended. But if drug testing is as intrusive and humiliating as Professor Kamisar suggests, how likely is it that such testing would be imposed on virtually everyone? The public has acquiesced to some kinds of random searches that are very widely imposed—for example, sobriety checkpoints and airport metal detection. Do these suggest that Professor Kamisar's fears of universal drug testing might be realistic? If so, do they suggest that the result would be deeply destructive to Fourth Amendment values?

In at least one respect, random drug testing of government employees is less hostile to Fourth Amendment values than are sobriety roadblocks and airport screening. Drug testing as a condition of employment is done to find qualified employees, not to enforce the criminal laws. In this respect, drug testing is simply one of many invasions of privacy—like aptitude testing, physical examinations, and the taking of personal histories—that can accompany employment decisions. Is urine testing more or less a "search" than these kinds of inquiries? Should individualized suspicion be required before some or all of these intrusions are permitted?

The First and Fifth Amendments:

Freedom of Speech and the Privilege Against Self-Incrimination

By Justice William H. Erickson

William H. Erickson is an associate justice on the supreme court of the State of Colorado, and served as chief justice on that court from 1983 to 1985.

THE UNITED STATES CONSTITUTION provides protection for the rights and privileges of an individual in the Bill of Rights. The extent to which the First Amendment's cherished right of freedom of expression and speech is protected is, on occasion, measured against the Fifth Amendment privilege against self-incrimination.

Both the First and Fifth Amendments seek, in part, to protect forms of communication, although for different purposes and with different goals. Communications are protected by both amendments, but how those communications are defined differs significantly based on the Supreme Court's interpretation of the two amendments.

The Fifth Amendment's protection against self-incrimination is limited to very specific verbal or written assertions. The protections of the First Amendment encompass a wide variety of both speech and expressive conduct. Our Founding Fathers, in their wisdom, provided guidance in the enactment of the First and Fifth Amendments to enable an individual in a free society to have the greatest freedom of expression without being forced to divulge information that would enable law enforcement officers to convict that individual based upon his own statement.

Court Cases Defining Protected Expression

In order to more fully understand the relationship between the two amendments, it is necessary to review several court cases that have defined the types of expression protected by the First and Fifth Amendments, as well as the incorporation of First and Fifth Amendment rights to the states through precedent Fourteenth Amendment cases.

Let us begin with the latter. The Fourteenth Amendment has been the avenue for the enforcement of the Bill of Rights in state court proceedings. The *Slaughterhouse Cases* (1872)[1] were the first to reject the claim that the entire Bill of Rights was incorporated in the Fourteenth Amendment. The Supreme Court has since incorporated into the Fourteenth Amendment those rights in issue that are essential to fundamental fairness and implicit within the concept of ordered liberty. The formula for incorporation was most aptly stated by Justice Benjamin Cardozo in *Palko v. Connecticut,* (1937)[2]:

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

In *Adamson v. California* (1947)[3], the Supreme Court came within one vote of holding that the Fourteenth Amendment guarantees that "no state [can] deprive its citizens of the privileges and protections of the Bill of Rights." Since the "incorporation" of the entire Bill of Rights was rejected by the Court, it has been through a selective basis that most of the rights guaranteed by the First and Fifth Amendments have been absorbed into the Fourteenth Amendment.

Nearly all of the rights enumerated in the First Amendment have been held to apply to the states through the Fourteenth Amendment. The due process clause has been held to protect freedom of speech (*Fiske v. Kansas*, 1927)[4]; freedom of press (*Near v. Minnesota*, 1931)[5]; and freedom of religion (*Everson v. Board of Education*, 1947)[6]. The cherished First Amendment rights have been accepted for incorporation in the Fourteenth Amendment with more unanimity than the rights guaranteed to an accused or convicted person under the Fourth, Fifth, Sixth, and Eighth Amendments.

Likewise, the Fifth Amendment privilege against self-incrimination (which applies to both defendants and to witnesses) has been held to apply to the states and to be an integral part of the Fourteenth Amendment (*Malloy v. Hogan*, 1964; *Miranda v. Arizona*, 1966; and *Schmerber v. California*, 1966).[7]

The touchstone of commonality between the First and Fifth Amendments becomes apparent when the right to privacy (to be let alone) was recognized in *Griswold v. Connecticut* (1965).[8] The right of privacy was first espoused in 1890 in a now famous *Harvard Law Review* article, "The Right to Privacy"[9] written by Samuel Warren and Louis Brandeis. In that article, Warren and Brandeis for the first time clearly looked at privacy interests connected with personal information and the individual.

In *Griswold*, however, the Supreme Court recognized that the right of privacy was more than the right to be let alone. The so-called Planned Parenthood case came before the Court for interpretation of Connecticut's anti-birth control statute, which had been under siege since 1941. The Connecticut statute fell before a judicial broadside that involved the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution, and "penumbras" arising out of these amendments.

The exact nature and extent of these "penumbras" were not defined in *Griswold* and bear considerable scrutiny. The Court said the Connecticut legislature, in condemning the use of contraceptives rather than regulating their manufacture and sale, swept too broadly in achieving maximum destructive impact on the marital relationship.

Unlike the interpretation of a right to privacy emanating from several amendments in *Griswold*, analysis of the rights protected by the First and Fifth Amendments demonstrates that the Supreme Court has not addressed the interrelationship of the two amendments. The Fifth Amendment has been interpreted to have reasonably defined borders.

In *Schmerber v. California* (1966), the Supreme Court approved the withdrawal of blood and the admission of evidence of the analysis of the blood for alcoholic content in a criminal case where the defendant was accused of driving an automobile under the influence of intoxicating liquor. In this case the Court said:

> We hold that the [Fifth Amendment] privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.[10]

The Court then said:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States* (1885).[11] On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[12]

Real Versus Testimonial Evidence

The basic distinction engrafted onto the Fifth Amendment privilege is the real versus testimonial evidence dichotomy. The privilege protects an accused from being compelled to provide the state with evidence of a "testimonial" or "communicative" nature, but there is no bar against compulsion that makes a suspect or accused the source of "real or physical evidence," such as a blood test, a police lineup, or a handwriting or voice sample.[13]

The reach of the privilege is broad enough to prevent the imposition of any sanction that makes "costly" the exercise of the privilege (*Griffin v. California*, 1965).[14] Once the danger of incrimination has been removed, however, as by a sufficient grant of immunity, the testimony or documents can no longer be withheld (*Ullmann v. United States*, 1956; *Counselman v. Hitchcock*, 1892).[15] Finally, all the rules above summarily stated are applicable as limitations on the states to the same extent as on the federal government through the forces of the due process clause of the Fourteenth Amendment (*Malloy v. Hogan*, 1964).[16]

During the 1989-90 term, the Supreme Court in *Pennsylvania v. Muniz*[17] reaffirmed that not only must testimony be a written or verbal act to fall under the Fifth Amendment's protection, but that a statement of fact or opinion made a difference as well. Muniz was stopped in the early morning by a state patrolman who suspected he was driving under the influence of intoxicating liquor. After administering a standard field sobriety test, Muniz was taken into custody and brought to the local police station.

Following routine practice, the police videotaped Muniz while he was being booked at the station. Muniz claimed that his Fifth Amendment right against self-incrimination was violated when the videotape was made because he had not been given a *Miranda* warning against self-incrimination.[18]

Muniz asserted that he was forced to incriminate himself by (1) answering questions posed by the officers regarding his name, address, height, eye color, date of birth, age and weight; (2) questioning him about the date of his sixth birthday; and (3) his verbal testimony during the field sobriety test and before the video recorder.[19]

Whether something is testimonial depends on whether "an accused's com-

munication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[20] For this reason, Justice Brennan found that Muniz's words were not testimonial simply because they were slurred: "any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to [the officer's] direct questions constitute nontestimonial components of those responses."[21] Muniz's failure to know the proper date of his sixth birthday, however, was testimonial, since it was his answer's *content* that showed that he was confused.[22] The Court did not address whether Muniz's utterances made during the sobriety test were testimonial since it first found that they were not the result of custodial interrogation and therefore were not protected by *Miranda*.[23]

First and Fifth Amendment Differences

Comparing the rights protected by the Fifth Amendment against those enumerated in the First Amendment emphasizes the difference between the two amendments. The First Amendment specifically protects freedom of speech and the press. Justice Hugo Black imposed an absolute barrier to restrictions on freedom of speech and press: the wording was that Congress shall pass no law abridging the right, and no law is what was meant. Black's construction never carried the day, however, and the Court has allowed Congress and the states to abridge speech where the interest of the state is sufficient to overcome the protection. How far the state can go depends on how important its interest is, the availability of alternatives to regulating speech, and what form the speech takes.

Thornhill v. Alabama (1940)[24] held that picketing was protected speech, and recognized that expression can take the form both of words and conduct.[25] To define expressive conduct has proved to be more difficult. *Spence v. Washington* (1974)[26] looked to whether the conduct possessed sufficient "communicative elements" to invoke the First Amendment, and whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it." The main difference between the two approaches, then, is that the First Amendment looks to subjective criteria, whereas the Fifth depends on an objective test.

Expressive conduct under the First Amendment was reviewed in *Texas v. Johnson* (1989),[27] the flag burning case. *Johnson* involved a political demonstration that ended with the defendant unfurling an American flag, dousing it with kerosene, and setting it on fire. Johnson was subsequently charged with violating a Texas statute making it a crime to desecrate a venerated object.

Johnson's conviction was reversed because burning the flag was expressive conduct not outweighed by any state interest. Using the *Spence v. Washington* test, the Supreme Court found communicative elements sufficient to invoke the First Amendment; Johnson intended to convey a message by burning the flag, and the message would be understood by those that viewed it. The state's asserted interest in preserving the flag as a national symbol and in preventing breaches of the peace were not substantial enough to outweigh Johnson's First Amendment protections.[28]

Although our Founding Fathers were not in a position to predict the interpretation that the United States Supreme Court would afford the First and Fifth Amendments to the Constitution, the plain wording of the amendments protects freedom of expression and prevent compelled self-incrimination.

Many decisions have been rendered resolving particular controversies involving the First and Fifth Amendments, but we can only speculate about what rights will be recognized under both amendments in the 21st century.

1. The *Slaughterhouse Cases*, 83 U.S. 36 (1872).
2. *Palko v. Connecticut*, 302 U.S. 319 (1937).
3. *Adamson v. California*, 332 U.S. 46, 74-75 (1947).
4. *Fiske v. Kansas*, 274 U.S. 380 (1927).
5. *Near v. Minnesota*, 283 U.S. 697 (1931).
6. *Everson v. Board of Education*, 330 U.S. 1 (1947).
7. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Schmerber v. California*, 384 U.S. 757 (1966).
8. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
9. *The Right to Privacy*, 4 Harv. L. Rev., 1934 (1890).
10. *Id.* 384 U.S. 761.
11. *Boyd v. United States*, 116 U.S. 661 (1885).
12. *Schmerber*, 384 U.S. at 763-64 (footnote omitted).
13. *Schmerber v. California*, 384 U.S. 757, 760-65 (1966); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).
14. *Griffin v. California*, 380 U.S. 609, 614 (1965). See also *Spevack v. Klein*, 385 U.S. 511 (1967).
15. *Ullmann v. United States*, 350 U.S. 422 (1956); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).
16. *Malloy v. Hogan*, 378 U.S. 1 (1964).
17. *Pennsylvania v. Muniz*, 58 U.S. L. W. 4817 (U.S. June 19, 1990).
18. *Miranda v. Arizona*, 384 U.S. 436 (1966).
19. The Court created a new "routine booking question exception" which exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial service. Therefore, the answer to the biographical questions did not fall under *Miranda*'s protections.
20. *Pennsylvania v. Muniz*, 58 U.S. L.W. at 4821 (citations omitted).
21. *Id.* at 4820
22. *Id.*
23. *Id.* at 4823.
24. *Thornhill v. Alabama*, 310 U.S. 88 (1940).
25. It is interesting to note, however, that expressive conduct enjoys less protection than does its speech counterpart. Under *United States v. O'Brien* (1968), the government may restrict the conduct portion of speech if the regulation is "within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest."
26. *Spence v. Washington*, 418 U.S. 405 (1974).
27. *Texas v. Johnson*, 109 S. Ct. 2533 (1989).
28. The Court found that the less rigorous test employed in *O'Brien* did not apply since Texas prosecuted Johnson solely because of his motives for burning the flag. Had he burned the flag because it was torn or damaged, he would not have been prosecuted.

Discussion:

The right to freedom of speech and the privilege against self-incrimination are similar, explains Justice Erickson, in that both prevent the government from forcing individuals to communicate. In this sense, each protects privacy and personal autonomy. On the other hand, Justice Erickson notes that the two rights also have different purposes and are protected in different ways. The communications that are shielded under the Fifth Amendment are defined narrowly to include only written and oral statements rather than physical behavior. Accordingly, a defendant can be required to submit to blood testing, fingerprinting, and so on. The communications protected under the First Amendment are defined broadly to include many kinds of physical conduct, including picketing and flag burning.

If it is true that the Fifth Amendment protects human dignity by insulating the individual from governmental intrusions, perhaps the right against self-incrimination is being defined too narrowly. Recall how Professor Kamisar argued that drug testing as a condition of government employment threatens important values. Does requiring a

criminal defendant to provide urine samples raise similar problems? Defendants can sometimes be compelled to disclose records, letters, and perhaps even personal diaries because those communications, when originally made, were voluntary. Does forced disclosure of such personal information at a criminal trial threaten the sorts of fundamental elements of being human that Professor Smolla said the First Amendment was designed to protect?

It is also possible to wonder, however, whether the Fifth Amendment was actually designed to serve any such grand value as personal autonomy. Even those communications that it does permit the individual to keep private are protected only from disclosure that could lead to a criminal conviction. If a prosecutor or legislative committee grants immunity from prosecution, an individual can be compelled to reveal personal information. The Fifth Amendment protects against self-*incrimination*, not against invasions of privacy. In what way, then, might it be thought to protect human dignity? Would it subordinate autonomy or dignity to force a defendant to answer polite questions in open court? How?

One possible advantage to the narrower or "objective" approach to defining protected communications is that it is easier to provide full protection to those statements that are protected. Justice Hugo Black, among others, has said that if protected speech is defined too broadly, the government will inevitably be permitted to regulate it. Indeed, as "speech" comes to be indistinguishable from all other behaviors, it might end up receiving no more judicial protection than ordinary behaviors. Justice Erickson says that the Court has defined expressive conduct by asking whether the behavior was intended to communicate a message and whether the audience was likely to understand that message. Under this method, is dressing like a punk rocker speech? How about blowing up a military recruiting office? This year [1991] the Court is deciding whether "exotic dancing" for hire is protected speech. Should it be? If so, should speech be given more protection than other freedoms?

The First and Sixth Amendments:

Reconcilable Rights to a Fair Trial and a Free Press

Roslyn A. Mazer is a litigation partner at the Washington, D.C., law firm, Dickstein, Shapiro & Morin, where she specializes in media law.

Deborah P. Kelly is an associate at Dickstein, Shapiro, & Morin, and vice-chair of the American Bar Association Victims Committee.

By Roslyn A. Mazer and Deborah P. Kelly

IN MIAMI, FLORIDA, deposed Panamanian General Manuel Noriega talks with a member of his criminal defense team on the telephone from prison and later learns that Cable News Network has broadcast tapes of his conversation. In Riverdale, California, Robert Diaz, a hospital nurse, charged and later convicted of murdering 12 patients by injecting them with fatal doses of a heart drug, requests the closure of a 41-day preliminary hearing. In Medora, North Dakota, an 11-year-old boy, the adopted son of Ernest Klem, testifies in a courtroom closed to the public that his adoptive father sexually abused him. In Washington, D.C., President Reagan's former adviser Michael Deaver, on trial for perjury, questions prospective jurors in an open courtroom about any history of alcohol abuse in their families.

Does the First Amendment give the press the right to jeopardize General Noriega's Sixth Amendment right to a fair and public trial? Must our most vulnerable citizens and child witnesses be forced to answer deeply personal questions or relate psychologically traumatic incidents in public?

Two hundred years ago, criminal trials in the United States and England were presumptively open. But while the Founding Fathers embraced this principle, the First Amendment does not explicitly ensure the right of the press to have access to criminal proceedings. The First Amendment does guarantee, however, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Freedom of speech depends upon a free flow of information about governmental affairs which in turn requires that the press have access to information about criminal proceedings. Such access also fosters vigorous discussion of governmental affairs which is at the heart of the First Amendment.

In contrast to the First Amendment, the criminal defendant's right to a "speedy and public trial" is explicitly guaranteed in the Sixth Amendment. The historic rationale is that a trial conducted in public gave "assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." (*Richmond Newspapers v. Virginia*, 1980.) Public proceedings also vindicate the concerns of the victims and the community at large by providing a safe outlet for members of the community who may be outraged over heinous crimes and comforted in the knowledge that the criminal justice system is responding. The Supreme Court has characterized this amalgam of interests as the "community therapeutic value" of openness.

Shifting Alliances

While the interests of the public in having access to criminal proceedings and the accused's Sixth Amendment right to a public trial often are parallel, two of the nation's most notorious criminal trials illustrate the dramatic tension that may also arise between these rights. Robert Diaz, a nurse charged with murdering twelve patients in Riverdale, California, by administering massive doses of the heart drug, lidocaine, persuaded a trial judge to exclude the public and press from a 41-day preliminary hearing. Albert Greenwood Brown Jr., a 26-year-old on trial for the rape and murder of a 15-year-old girl, joined with state prosecutors in successfully urging that transcripts of the jury selection process, voir dire, be sealed. In both cases, the defendants believed publicity would compromise their right to a fair trial, either by generating prejudicial pretrial publicity or by discouraging candid responses from prospective jurors in forcing them to answer embarrassing personal questions in public.

In these two cases, which were resolved by the United States Supreme Court, the defendants urged closure of the pretrial and jury selection proceedings. As we shall discuss, the Court has recognized a qualified First Amendment right of access to criminal proceedings and has instructed trial judges to consider all reasonable alternatives to closure in the rare circumstance when a competing societal interest warrants consideration of closure in a particular case. But the accused's interests are not always in conflict with the public's claim for access. The Supreme Court has recognized that "safeguarding the physical and psychological well-being of a minor is a compelling state interest." (*Globe Newspaper Co. v. Superior Court*, 1982.) When the state, a crime victim or a child witness asks trial judges to close trial proceedings to protect the victim's or witness's privacy interest, the defendant is often aligned with the press in resisting closure, relying on the Sixth Amendment's explicit guarantee of a public trial.

Resolving the Conflict

The Supreme Court has resolved this clash of interests by recognizing a presumption of openness of criminal trials and requiring the party seeking to close the hearing to "advance an overriding interest that is likely to be prejudiced" unless access is restricted and demonstrate that the closure "be no broader than necessary to protect the interest." The trial judge must also consider "reasonable alternatives to closing the proceeding" and "make adequate findings to support the closure."(*Waller v. Georgia*, 1984.)

As recently as 1979, however, over the objection of four Justices, the Supreme Court refused to recognize a Sixth Amendment right on the part of the press or public to attend a pre-trial suppression hearing. (*Gannett Co. v. DePasquale*, 1979.) Indeed, it was not until 1980, in *Richmond Newspapers v. Virginia*, that the Supreme Court squarely recognized the press and public's enforceable right of access to public trials under the First, not the Sixth Amendment. Because of the demanding standard which must be satisfied to justify closure of criminal proceedings, parties seeking access generally prevail. In 1986, the Supreme Court reversed the trial judge's closure order in the Diaz murder case. The trial was closed out of concern that because of the national attention it attracted, "only one side may get reported to the media." The Supreme Court, however, found this to be insufficient, holding that the order unconstitutionally infringed upon the public's qualified First Amendment right of access to a prelim-

inary hearing. In the Brown rape and murder case, the trial judge's failure to consider methods to protect prospective juror's privacy interests, other than sealing voir dire transcripts, caused the Supreme Court to overturn the closure order in 1984. Similarly, the appellate court in the Deaver case overturned a trial court order excluding the press from jury selection.

In arriving at a proper balance between the First and Sixth Amendments, the potential trauma to victims of sex crimes and the recurring issues surrounding testimony of child witnesses present a special dilemma for trial judges. The North Dakota man on trial for sexually abusing his 11-year-old adopted son claimed that his Sixth Amendment right to a public trial was denied when the judge, over the defendant's objection, ordered the courtroom cleared except for one media representative while the child testified. The state supreme court reversed the conviction, principally because the trial court had failed to hold an evidentiary hearing or make specific findings as to the child victim's psychological maturity and how this would affect his ability to cope with testifying in public. This omission resulted in a violation of the defendant's Sixth Amendment rights to a public trial. (*State v. Klem*, 1989.)

With the same protective interests in mind, state legislatures have enacted laws which are solicitous of sensitive witnesses such as minors who are victims of alleged sex crimes. Their efforts have overreached at times, colliding with the defendant's Sixth Amendment rights. A Massachusetts statute that required the public to be excluded from court when child victims of alleged sexual offenses testified was held unconstitutional. In *Globe Newspaper Co. v. Superior Court*, the Court ruled in 1982 that the statute's failure to require a particularized determination that the witness needed such protection was fatal to its constitutionality under the First Amendment. This principle was applied in a 1989 case where the 10th Circuit found that a prosecutor's reference to "vague psychological problems" associated with the testimony of a 16-year-old alleged rape victim was insufficient to support the trial court's exclusion of press and public. (*Davis v. Reynolds*, 1989.)

Face-Off Between General Noriega and CNN

While conflicts between the First and Sixth Amendments are most commonly framed in terms of access to trial and pretrial proceedings, the controversy surrounding Cable News Network's November 1990 broadcast of a taped telephone conversation between General Noriega and a member of his defense team introduced another, highly provocative element: prior restraint. A federal district court judge in Florida enjoined CNN from broadcasting the tape recording, ruling that the broadcast would impinge upon Noriega's right to consult his lawyer. Noriega's lawyers claimed that the broadcast's infringement on the attorney-client privilege violated both their client's right to a fair trial and his right to effective assistance of counsel by disclosing trial strategy to potential jurors and prosecutors. CNN nonetheless proceeded to broadcast one of the tape recordings in violation of a court order. CNN lost the initial skirmish in the Supreme Court on November 18, 1990, when the Court, by a 7-2 vote, refused to vacate the federal judge's "gag order" barring the broadcast for 10 days while he reviewed the tapes to determine if their airing would jeopardize Noriega's Sixth Amendment rights. After the tapes were reviewed, defense lawyers withdrew their objections to

the broadcast, concluding nothing on the tapes would jeopardize their client's defense. The trial judge thereafter lifted the "gag order" on November 28, 1990.

The Noriega case raised an issue that many believed had been resolved years before, namely, that the government bears a nearly insurmountable burden to demonstrate that a prior restraint is justified. In *Nebraska Press Association v. Stuart* (1976), the Supreme Court considered a gag order that restrained the press from publishing or rebroadcasting accounts of the confessions or admissions by the accused charged with mass murder in a small town. In vacating the order in 1976, the Supreme Court underscored the "heavy presumption against . . . constitutional validity" that a gag order bears and ruled that alternatives to prior restraint, such as change of venue, sequestration of the jury, extensive voir dire and other such measures had not be explored. Despite such prophylactic measures, however, trial judges continue to have vexing problems sorting out post-conviction allegations of actual or implied juror bias. In limited circumstances, four justices of the Supreme Court have recognized a defendant's right to a new trial where the defendant establishes that a juror answered a voir dire question dishonestly (or withheld material information), and a correct response would have provided a valid basis for a challenge for cause. (*McDonough Power Equipment, Inc. v. Greenwood*, 1984.)

Continuing Forums for Conflict

Another novel example of the tension between the First and Sixth Amendments was resolved in a 1987 Florida case when Carlos Enrique Lehder-Rivas was under indictment in one of the largest narcotics conspiracy and racketeering prosecutions ever brought in the United States. The accused successfully resisted an attempt by prosecutors to secure a temporary restraining order enjoining Lehder-Rivas and his defense team from conducting survey activities, on the ground that it would constitute an unconstitutional prior restraint. Within three weeks of trial, however, the prosecution asked the court to enjoin Lehder and his attorneys from conducting further polls and surveys of registered voters in the Jacksonville area as part of their trial preparation. Opposing the government's request, Lehder argued that the order violated his First Amendment right "to know how the community perceives him and how he can obtain a fair trial" and his Sixth Amendment right to effective assistance of counsel and a fair trial. The Florida trial judge resolved the conflict solely on the ground that the survey "could potentially contribute to the inflammation of the publicity" the case had already generated, finding that the government had carried its burden of proving a "serious and imminent threat to the fair administration of justice." (*United States v. Lehder-Rivas*, 1987.)

It is evident from these sometimes conflicting interests between and among the criminal defendant, prospective jurors, witnesses, the press and public that two factors are decisive to the outcome: the procedural setting in which access rights are pressed and the constitutional rights sought to be vindicated. These considerations recently coalesced in a challenge by the Times Mirror Company and The Copley Press to a magistrate's order sealing an arrest warrant and supporting documents associated with a 1988 FBI investigation into allegations of fraud and bribery in the defense contracting industry. In 1989, the Ninth Circuit overturned the district court's order unsealing the search warrant information on

First Amendment grounds, holding that, unlike criminal trials, there is no historical tradition of access to search warrant materials and that unrestricted access would both impede the government's ability to conduct criminal investigations and infringe on an innocent individual's privacy rights. (*Times Mirror Co. v. United States*, 1989.)

On two occasions in 1990, federal courts have considered and rejected efforts by newspapers to gain access to transcripts of bench conferences between counsel and the court in proceedings arising from the mail bomb assassination of federal appeals court Judge Robert S. Vance. (*United States v. Moody*, 1990.) The press can be expected to seek to extend its access claims at the legal margins, hoping to report on even concededly "closed" proceedings such as grand jury investigations.

Conclusion

The cherished rights embodied in the First and Sixth Amendments do not lend themselves to easy demarcation, and it is evident from the occasions when these rights conjoin that one right does not start where the other stops. At times, the enforcement of Sixth Amendment rights appears to tip the scales unfairly in favor of the most hated minority—the accused in a criminal case. At other times, the public's right to know seems vindicated cruelly at the expense of the most vulnerable: the alleged rape victim or the child witness. The reconcilable tension between these rights is necessary, and no one captures the complex weave of these rights in the Constitution better than Justice William Brennan who, with customary eloquence, said in the *Richmond Newspapers* case:

> The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives.

The sometimes conflicting rights of a free press and a fair trial present delicate questions of constitutional balance. Our courts reconcile the express right to a public trial guaranteed in the Sixth Amendment with vigilant enforcement of the First Amendment right of access necessary to vindicate important interests of both the accused and the public.

Discussion:

The public has a right of access to judicial proceedings under the First Amendment, and the accused has a right to a public trial under the Sixth Amendment. Roslyn Mazer and Deborah Kelly describe the sometimes poignant ways that the resulting publicity can collide with other important values, including fairness and privacy. Reviewing various cases where courts have attempted to balance these competing values, they note that the scales occasionally seem to tip in favor of the accused in a way that exposes vulnerable people, such as rape victims and child witnesses, to the glare of publicity. Their essay suggests that such imperfections reflect underlying conflicts that are to some degree unavoidable if courts are to vindicate "important interests of both the accused and the public."

Consider some of the specific balances struck by the courts. In a case involving the rape and murder of a child, the Court held that jurors' answers to questions about their possible bias could not be sealed because the trial court had not considered

other ways of protecting the privacy interests of the jurors. Even if all alternatives to sealing the record had been found inadequate, do you think the public should have been denied information relevant to jurors' impartiality? Recall the arguments made by Morton Halperin for allowing access to governmental information. And remember that jury duty is a public obligation and an official occasion. We do not hesitate to investigate the private lives of governmental officials who exercise important functions. Why should we hesitate to expose jurors to scrutiny?

On the other hand, should the court have required that a child rape victim testify in a courtroom open to the media? We know that testifying can be an ordeal even for an adult. The public could have been informed immediately of the child's testimony by the one media representative that the judge had allowed in the room; eventually the public could have had full access to the trial transcript. Does the public need any more information than this? Why?

This essay also discusses important issues that arise once the press has gained access but before publication has actually occurred. When, if ever, should courts issue "gag orders" (prior restraint) to block publication of information? The judge in the Noriega case temporarily blocked CNN from broadcasting taped telephone interviews between General Noriega and his lawyers. Should a judge's decision to stop the publication of specific information in the hands of the press be harder to justify than a decision to permit a witness to testify in private? Were any special dangers to free speech values involved in the kind of delay caused by the Noriega gag order?

If a "nearly insurmountable" legal presumption had prevented the judge in the Noriega case from issuing his order, would that have been an appropriate occasion for the kind of professional self-discipline recommended in Bruce Sanford's essay? In fact, some of the tapes were broadcast despite the restraining order. Was this journalistic defiance of a judicial decree justified?

The Eighth Amendment: An Analysis

Ralph Adam Fine is a judge on the Wisconsin Court of Appeals and author of *Escape of the Guilty* and *Fine's Wisconsin Evidence*.

By Ralph Adam Fine

THE DECLARATION OF INDEPENDENCE reminds us that "governments are instituted" in order to secure our "unalienable rights" including "Life, Liberty, and the Pursuit of Happiness." These rights are enervated, however, when people are terrorized by crime and the fear of crime; men, women, and children who are afraid to walk the streets of their community or who cower behind bolted doors and barred windows are not free.

Although most persons have an inner accountability—a conscience that controls unbounded license, the Constitution recognizes that those who do not must be subject to the law's restraints and, if they break those restraints, sanctions. Thus, in its letter transmitting the newly-minted Constitution to Congress for approval, the Framers acknowledged that persons "entering into society must give up a share of liberty to preserve the rest." The first ten amendments to the Constitution, the Bill of Rights, help keep the "share of liberty" given up as small as is practicable so that the rest of liberty will indeed be preserved.

The Eighth Amendment addresses two areas of the criminal process: pretrial liberty and post-conviction punishment. Introduced by James Madison in the 1789 Congress considering the Bill of Rights, it was adopted with almost no debate. The amendment, with one superficial change, was copied from the 1776 Virginia Declaration of Rights, which, in turn, was taken verbatim from the 1689 English Bill of Rights: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Here, as elsewhere, jurisprudence in the United States is a child of English law.

Pretrial Liberty

Bail accommodates and balances both an accused's liberty interest and society's obligation to adjudicate guilt or innocence. It has ancient roots in English law. As Sir James Fitzjames Stephen observed in his 1883 treatise on the history of the criminal law of England:

> When the administration of justice was in its infancy, arrest meant imprisonment without preliminary inquiry till the sheriff held his tourn [session of court] at least, and, in more serious cases, till the arrival of the justices, which might be delayed for years, and it was therefore a matter of the utmost importance to be able to obtain a provisional release from custody.

Release, however, was at the discretion of the sheriff, and this permitted significant abuses. In 1275, the Statute of Westminster the First attempted to eliminate much of the discretion by specifying those crimes that were bailable and those that were not. Although, as supplemented by later enactments, it governed the law of bail in England until the 19th century, the Statute of Westminster was

frequently circumvented when persons out of favor were arrested and kept in custody on unspecified charges. The matter came to a head in 1627 when five knights were arrested and detained by the order of Charles I because they would not "loan" money to the Crown. Seeking their liberty, the knights argued that their incarceration violated the Magna Carta, which had been extracted from a reluctant King John in 1215 and subsequently affirmed by succeeding monarchs. The Magna Carta prohibited the imprisonment of any freeman "unless by lawful judgment of his peers, or by the law of the land." The judges hearing the knights' case, however, ruled that this did not apply to pretrial detention ordered by the king. The ruling was overturned a year later, in 1628, when Parliament presented Charles I with the Petition of Right, to which he reluctantly agreed.

Some 50 years later, continued unjustified denials of bail prompted Parliament to try again. The 1679 Habeas Corpus Act established definite procedures for release on bail and imposed penalties on judges if they did not comply. Nevertheless, the right to bail was still circumvented; the king's judges simply set amounts too high to be met. When James II fled to France in the waning days of 1688 and was succeeded by William and Mary, a Convention Parliament, elected at William's call, drafted a Declaration of Rights, which was formally enacted in December of 1689 as the Bill of Rights. This seminal document complained that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the law made for the liberty of the subjects," and decreed, as we have seen, that "excessive bail ought not to be required." Thus was merged the two aspects of pre-trial liberty under English law: the Statute of Westminster's specification of which crimes were bailable, and the English Bill of Rights' prohibition against "excessive bail." The Eighth Amendment elevated to the level of constitutional command only the latter prohibition.

In Colonial America, the right to bail was established by the legislature, and the same is true today. Thus, in 1987, the United States Supreme Court upheld the constitutionality of a federal statute that permits pretrial detention if the government demonstrates by clear and convincing evidence that no conditions of release "will reasonably assure . . . the safety of any other person and the community." Additionally, judges retain the inherent power to impose pretrial detention when that is essential to the integrity of the process. Thus, bail may be denied to those defendants whose threats to witnesses jeopardize the system's ability to adjudicate guilt or innocence.

In sum, the Eighth Amendment does not impose a right to bail in all cases. Rather, it prevents the setting of excessively high bail when pretrial release on bail is otherwise required.

Punishment

Prior to the Norman conquest in 1066, criminal justice in Anglo-Saxon Britain was erratic but swift, and afforded almost no due-process protections to those accused of crime. Malefactors caught red-handed were executed on the spot. Those who were able to escape immediate apprehension were chased down and then executed. For a time, an offender could purchase immunity from retaliation by a victim's family by paying money, called a *wergild* or "man's price." Ultimately, however, these money payments were supplanted by a variety of physical punishments. These punishments were devastating: mutilation—the loss of

hands and feet under Henry II, and emasculation and exoculation under his great-grandfather William the Conqueror. As British legal historians Frederick Pollock and Frederic Maitland explain the word "exoculation" from the comfort of Victorian England, "We use too mild a word if we speak of 'blinding.' The eyes were torn out."

During early post-Conquest England, the form of punishment was generally discretionary with the judge, who was guided by the king's personal preferences. As Pollock and Maitland explain, the felon could hardly "complain if a foot was taken instead of his eyes, or if he was hanged instead of being beheaded." By the 13th century, death had substantially supplanted mutilation as the preferred penalty for felons. Petty larceny was sometimes punished by whipping and sometimes by taking the thief's ear. In some locales, the thief would have his ear nailed to a post and would be given a knife with which to cut himself free. Third offenders—those who had no more ears to lose—went to the gallows. It is no wonder that there were those in that capricious age who not only wanted the nature of punishment to be fixed—to "fit the crime" as it were—but also wanted a limitation on its cruelty as well.

The Magna Carta addressed two problems of punishment—predictability and severity—in a rudimentary way. Among the rights to which King John and his successors acquiesced was that amercements (levies payable to the king by those who either violated the law or neglected an obligation) should be apportioned to the nature of the crime and not be so excessive so as to deprive the person amerced the means of livelihood. In 1684, however, this provision was held not to apply to fines levied for offenses against the Crown, thus permitting such heavy fines that many of the king's enemies languished in prison because they could not pay. The "excessive fines" clause of the 1689 Bill of Rights was designed to revive the ancient protection against disproportionate monetary punishment.

"Excessive Fines" Limits Left Undefined

As we have seen, the "excessive fines" clause of the Eighth Amendment comes directly from the English Bill of Rights. This clause, however, has long lain dormant. Although the Supreme Court has used the "equal protection" doctrine to prevent the incarceration of indigent defendants in lieu of fines they are unable to pay, it has so far failed to discuss in any meaningful way how the "excessive fines" clause limits the imposition of monetary penalty by government. In 1989, however, the Supreme Court did rebuff an attempt by a civil litigant to interpose the clause as a shield against an award of punitive damages. Holding that the clause does not apply to lawsuits between private parties, the Court nevertheless left for future analysis whether the prohibition against excessive fines might apply in a quasi-criminal or civil context and "constrain an award of money damages" when the government has either prosecuted the action or has a right to receive a share of any damage award. (In 1991, the Supreme Court is considering whether unrestrained awards of punitive damages violate due process.) As a result of this recent attention, the "excessive fines" clause may yet emerge from its long quiescence in response to the ever-increasing number of activities that are subject to fine and forfeiture.

In contrast to the limitations they placed on the severity of monetary

penalty, the English were fairly tolerant of harsh physical punishment. Indeed, as one scholar has noted, the 1689 English Bill of Rights' condemnation of "cruel and unusual punishments" appears to have been more aimed at those punishments that were grossly out of proportion to the nature of the offense rather than those that were merely barbarous:

> Executing male rebels [in England] by drawing and quartering continued with all its embellishments until 1814, when disembowelling was eliminated by statute. Beheading and quartering were not abolished until 1870. The burning of female felons continued in England until the penalty was repealed in 1790.

Nevertheless, the early American view was that the prohibition against cruel and unusual punishments concerned methods of infliction rather than proportionality. Indeed, during Congress' consideration of the Bill of Rights, one member complained that the Eighth Amendment's prohibition against cruel and unusual punishments was too constraining. There were, he argued, "villains [who] often deserve whipping, and perhaps even having their ears cut off," and, that until "a more lenient mode of correcting vice and deterring others" was found, "we ought not to be restrained from making necessary laws by any declaration of this kind." In 1910, however, the Supreme Court determined that the clause also prohibited punishments that were disproportionate to the crime, and reversed a sentence of fifteen years at hard and painful labor in irons for the falsification of a government document.

The Dispute Over Capital Punishment

The next milestone in the analysis of the "cruel and unusual punishments" clause came in 1958, when the Supreme Court, in *Trop v. Dulles*, nullified a statute that divested wartime deserters of their citizenship. In a plurality opinion for himself and three other justices that has been viewed by many as the standard of contemporary Eighth Amendment analysis, then Chief Justice Earl Warren declared that the Eighth Amendment's prohibition against cruel and unusual punishments was "not static," but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." This statement was prelude to the bitter dispute over capital punishment, which quickly became the clause's major focus.

In 1972, the Supreme Court in a 5-4 decision, *Furman v. Georgia*, held that the death penalty, as administered, violated the Eighth Amendment. Each of the five justices in the majority filed separate opinions. Even though both the Fifth Amendment, which was adopted contemporaneously with the Eighth, and the Fourteenth Amendment both specifically recognize capital punishment, Justices William J. Brennan Jr. and Thurgood Marshall concluded that under an "evolving standards" analysis the death penalty was *per se* cruel and unusual. Justices Potter Stewart and Byron R. White believed that the death penalty was cruel and unusual because, in their view, it was being applied arbitrarily. Finally, Justice William O. Douglas contended that capital punishment violated the Eighth Amendment because minorities and the poor were more likely to be sentenced to death.

In response to *Furman*, 35 states revised their statutes, and, in 1976, the Supreme Court in a 7-2 decision, *Gregg v. Georgia*, upheld capital punishment for

murder as long as the process permitted individualized sentencing judgments based on appropriate and carefully delineated standards. Justices Brennan and Marshall dissented. Since then, application of the Eighth Amendment to capital punishment has generally focused on procedure. Nevertheless, the Court continues to apply the "evolving standards of decency" analysis by searching the entrails of public opinion for what it has characterized in one capital-punishment decision as a "national consensus." The results have been both subjective and, as a consequence, fuzzy. Thus, to give one example, the Court has determined that execution of defendants who were fifteen when they committed murder is cruel and unusual, but that execution of those who were sixteen is not.

A significant area where the Court's analysis in death-penalty cases may be in transition concerns the victim's role in the criminal process. Although victim-impact statements are common in non-capital cases, and, indeed, the federal system and more than two-thirds of the states require that sentencing courts consider them, the Supreme Court held in the 1987 5-4 decision of *Booth v. Maryland* that the use of such statements in death penalty cases violated the "cruel and unusual punishments" clause because it "creates an impermissible risk that the capital-sentencing decision will be made in an arbitrary manner." More recently, however, in 1989, five justices have questioned *Booth*'s rationale. Additionally, Justice Brennan, with the majority in *Booth*, is no longer on the Court.

The Future

Most of the crucial Eighth Amendment issues have been resolved. First, the "excessive bail" clause has been limited to its language and history. Second, although the "excessive fines" clause has been held not to apply to civil damage actions, at least where the government has neither prosecuted the action nor will receive a share of the damage award, it seems probable that this clause, dormant no longer, will be asserted in connection with the wide range of government-imposed monetary penalties. Third, it is unlikely that the "cruel and unusual punishments" clause will ever be applied to prohibit capital punishment *per se*. The remaining battles over the death penalty will be fought around the edges—over the circumstances that may justify its imposition as well as the neutrality of its application. Despite continuing disputes over capital punishment procedures and the outer reaches of the "evolving standards" gloss, many death penalty opponents recognize the futility of seeking further expansion of the Eighth Amendment to outlaw a punishment specifically recognized by the Fifth and Fourteenth Amendments. Thus, they have turned their major attention to Congress, and state courts and legislatures. It is there that most future capital-punishment battles will be fought. ❦

Discussion:

Judge Fine describes how the modern meaning of the Eighth Amendment can be traced back to the English law that preceded our Constitution. The British tradition was to allow for the denial of bail in certain classes of crimes but to prohibit excessively high bail in those cases where bail was available. Ralph Adam Fine contends that this old British understanding continues in our system. He says that although the excessive fines clause has not been enforced by the Supreme Court, it, too, is likely to have its present meaning determined according to the English practice of prohibiting fines that

were too onerous. Finally, the cruel and unusual punishment clause also comes down to us from the English; it was originally aimed at preventing not severe punishments (which were common) but punishments that were disproportionate to the crime. Supplemented by a search for "evolving standards of human decency," this has been the meaning given the clause by our Court during most of this century.

Judge Fine's description of the meaning of the bail clause will surprise many because it goes against common assumptions about the "presumption of innocence." He says that the availability of bail is largely a matter for legislative determination. As a matter of historical fact, legislatures have determined which crimes are bailable. Kidnapping, rape, treason, arson, burglary, and even train wrecking have all been non-bailable offenses. Today, most crimes except murder are bailable, but there is a recent trend once again to add to the number of non-bailable crimes. New additions include certain types of sexual crimes and drug offenses.

Do you think that more crimes should be non-bailable? The eminent constitutional lawyer Laurence Tribe has written that the presumption of innocence "represents a commitment to the proposition that a man who stands accused of a crime is no less entitled than his accuser to freedom and respect as an innocent member of the community." Does this make sense to you? Should the Court rely on this presumption to strike down legislative decisions denying bail in, say, cases of selling narcotics to schoolchildren?

In one respect our bail laws have broken with the British tradition. Modern preventive detention statutes permit the denial of bail on the basis of predictions of future dangerousness rather than on the basis of strong proof that a crime has already been committed. Does the modern approach seem better or worse than the British system?

Does it seem right to you that the Supreme Court has not held (and, Judge Fine predicts, will not hold) that the death penalty is inherently cruel and unusual punishment? Should it matter that historically both the British and our own Framers imposed many horrific punishments, including capital punishment? Should it matter that the text of our Constitution seems to imply that the death penalty is permissible? If the death penalty is not necessarily unconstitutional, what do you think of the Court's present practice of striking down capital punishment when—as in the case of the death sentence for rape—the Court believes that it is excessive in relation to the crime?

The Ninth Amendment and Rights Not Enumerated

By Robert S. Peck

Robert S. Peck is a U.S. Supreme Court judicial fellow and an adjunct professor of law at American University.

RELIGIOUS LIBERTY, freedom of speech and of the press, and protection against unreasonable searches and seizures are among the most recognizable of Bill of Rights guarantees. Yet there is much more to the Bill of Rights, which also embraces other guarantees not specifically listed among its provisions. Some of these additional rights are encompassed by the Ninth Amendment, which states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

That single sentence confirms that the Bill of Rights is more than a governmentally granted set of liberties and guarantees. It acknowledges the existence of rights that predate the formation of the United States and that may be capable of expansion to meet new social and economic challenges that will accompany technological progress.

Modern computer technology allows vast amounts of personal information to be collected and disseminated easily. Medical advances, including the development of sensory implants, may risk disclosure of potentially embarrassing or harmful personal information, in addition to the life-saving purposes for which it was created. Interactive media not only open doors for our information-hungry society, but will send back to the source data about us that we may prefer to keep private. Those who put their trust in privacy laws are likely to be disappointed as these statutes have a tendency to fall behind technology and quickly become obsolete. Instead, the more organic principle of constitutional privacy may be called upon to prevent the governmental collection and disclosure of certain classes of personal information.

The Right of Privacy

The contemporary notion of a constitutional right of privacy is strongly identified with the Ninth Amendment. Although the amendment has gone largely unused by the people or by the courts, it is reasonable to assume, as Chief Justice John Marshall wrote in the seminal case of *Marbury v. Madison,* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." The first time that the Ninth Amendment was used to support a decision declaring a law unconstitutional was the 1965 case of *Griswold v. Connecticut.* The case arose after the Connecticut director of Planned Parenthood and a doctor were arrested, convicted and fined for providing contraceptive information to a married couple. A state law prohibited the use of contraceptives, as well as counseling or other assistance that would help a person use contraceptives.

In deciding the case, the Supreme Court noted that past decisions had not relied on rights specified in the Constitution but on "penumbras, formed by emanations from those guarantees that help give them life and substance." Wrote Justice William O. Douglas, for the majority, "Liberty in the constitutional sense

must mean more than freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom." In striking the Connecticut law and the convictions at issue in the case, the Court enunciated "a right of privacy older than the Bill of Rights." That right, the Court held, was found emanating from the First Amendment's unexpressed right of association, the Third Amendment's prohibition against the quartering of soldiers in a private home, the Fourth Amendment's ban on unreasonable searches and seizures, the Fifth Amendment's right against self-incrimination, and the Ninth Amendment's broad recognition of additional rights. These amendments were described as creating zones of privacy into which the government may intrude only when it has a compelling need. Connecticut's anti-contraception policy had no compelling basis, the Court ruled.

Although the Court did not elaborate about the Ninth Amendment's role in constitutional law, Justice Arthur Goldberg, in a concurring opinion, found support for a constitutional right to marital privacy in earlier precedents and in "the language and history of the Ninth Amendment." In his view, the Ninth Amendment operated as an enabling act, which allowed the prohibition against a state's taking of "life, liberty, or property without due process of law" found in the Fifth and Fourteenth Amendments to be read more broadly than the specific constitutional guarantees. The Ninth Amendment, Justice Goldberg wrote, included those liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental." A subsequent Supreme Court decision extended the privacy protection against contraception laws to unmarried couples.

The right of privacy is also at the root of the controversy over a woman's right to an abortion during the early stages of pregnancy. The majority in *Roe v. Wade* held that the right of privacy that includes the decision to have an abortion was located in the Fourteenth Amendment's concept of personal liberty and restrictions on state regulation, rather than the Ninth Amendment's reservations of rights of the people.[1] As a result of that decision, litigants claiming a violation of privacy rights will plead both the due process clause and the Ninth Amendment.

Justice Goldberg's analysis in *Griswold* correctly captured the constitutional philosophy that caused the Ninth Amendment to be included in the Bill of Rights. The Ninth Amendment's distinctive contribution is to prevent the other amendments from being viewed as a definitive catalog of all the rights that merit constitutional protection, and instead more as a starting point for the enunciation of individual rights. Rights are given legal meaning through the slow process of hearing cases between litigants who present real, rather than abstract, issues to a court. This constant testing of principle by practical application is how law grows under the common-law tradition we inherited from England.

History of the Ninth Amendment

The story of the Ninth Amendment is the story of the battle for the Bill of Rights itself. The state constitutions that predated the U.S. Constitution began with bills of rights, before even describing the form of government they adopted. However, the Constitutional Convention of 1787 rejected motions to include a bill of rights, which they believed unnecessary, in the new Constitution. The Framers believed that the limited powers granted to the federal government, enumerated in Article I, were unlikely to result in interference with personal rights.

Moreover, the Constitution's Framers subscribed to a philosophy of natural rights, rights that were inherent in the individual and were not a grant from government. As a result, an individual possessed these rights before the formation of a government and could not be deprived of the rights once a government was established.

Even James Madison, who was later to be the principal author of the Bill of Rights, originally opposed a federal declaration of rights, believing it to be an ineffective "parchment barrier" that could willfully be ignored by overbearing political majorities. Besides, as Alexander Hamilton asserted, the Constitution itself, by establishing a system of checks and balances, would operate as a bill of rights.

After the Antifederalists made the absence of a bill of rights an issue during the constitutional ratification debates, the Federalists promised the addition of amendments to secure personal rights, if the Constitution was ratified first. In the First Congress, Madison took responsibility for making good on this promise. Madison came to believe that a written description of these individual rights would assist the populace in understanding and asserting these rights. He feared, however, that no one was clever enough to catalog these rights adequately and that people would believe "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." In Madison's view, the omission of certain generally accepted rights from the Constitution simply because of the inadequacies of authorship should not result in the denial of these rights altogether. His solution was the Ninth Amendment.

Other Unenumerated Rights

The *Griswold* decision, while newly asserting the Ninth Amendment, followed a long tradition of giving substance to unenumerated rights. In 1923, for example, the U.S. Supreme Court decided a constitutional challenge to a Nebraska statute that forbade school instruction in any language other than English. The Court declared that the Fourteenth Amendment's promise of liberty meant more than "merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Two years later, in upholding the right of private schools to exist, the Court added the right of parents "to direct the upbringing and education of children" to the protections of the Constitution. In 1941, the Court had occasion to comment on marriage and procreation as "the basic civil rights of man."

Another unenumerated constitutional right that has achieved judicial recognition within this concept of liberty is the right to travel. Under this right, people are free to move among the states and journey to other countries. In the domestic context, the right to travel is part of the concept of national citizenship, giving all Americans a right to move from state to state. This right was invoked in 1941 to invalidate a California law intended to stem the flow of people into the state from economically depressed regions of the country. The California law, which made it a crime to bring a poor person into the state, was held unconstitutional, because

the concept of national citizenship gives all Americans the right to move from state to state.

Freedom of association, nowhere specifically stated in the Constitution, has also been found to have a constitutional basis. The 1958 decision that brought the issue to the Supreme Court resulted from Alabama's attempt to curtail in-state activities by the National Association for the Advancement of Colored People (NAACP). As part of a lawsuit accusing the NAACP of being an out-of-state corporation that had failed to qualify to do business in Alabama, the state attorney general obtained a court order that the civil rights organization disclose the names and addresses of its resident members. When the group refused to comply, it was cited for contempt and fined $100,000. The NAACP resisted disclosure of its Alabama membership list because past experience had demonstrated that the named individuals would be subject to economic reprisals, loss of employment, threats of physical coercion, and public hostility.

The Supreme Court found that compelled disclosure of the NAACP's members would constitute an unconstitutional restraint on freedom of association. "Effective advocacy of both public and private points of view, particularly controversial ones," the unanimous Court declared, "is undeniably enhanced by group association." The right of association was recognized as a component part of the goals protected by the First Amendment.

Adapting Liberty to Modern Conditions

To the Constitution's Framers, liberty meant freedom from arbitrary governmental interferences in personal affairs. In enunciating the right of privacy in *Griswold*, the Supreme Court was adapting this long-standing view of liberty to modern conditions. The Ninth Amendment fits into this scheme by allowing this type of growth in the way timeless principles are applied to new and unforeseen circumstances. New technological capacities and governmental interests will bring new challenges to the concept of privacy rights and to the arena that we regard as private. New applications of the concept of liberty will be needed to limit future governmental intrusions. The concept of informational privacy will most likely require that the Ninth Amendment be read in conjunction with the First Amendment to assure that people will not be afraid to exercise other basic freedoms because government might reveal associations, personal views, or private enjoyments, such as favorite television programs, that may evoke an undesired reaction from family, friends, colleagues or employers.

It is unlikely you will ever hear litigants assert their Ninth Amendment rights in the way the First, Fourth or Fifth Amendments are regularly brandished as weapons against unconstitutional governmental actions. Yet, although the Ninth Amendment has been little used to date, its importance may grow in the future. The novel problems of tomorrow are impossible to anticipate today, yet the 18th century language of the Ninth Amendment may well be critical to the constitutional jurisprudence of the 21st century.

1. The idea of privacy as a Fourteenth Amendment liberty guarantee that can be combined with the First Amendment also found expression in *Stanley v. Georgia* (1969), where the Court invalidated a state law prohibiting the "private possession of obscene matter." In the course of its opinion, the Court declared that at a minimum the First Amendment must mean that "the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Since then, however, the Court has been reluctant to extend this principle, ruling in 1975 that public exhibitions of obscenity can be criminalized even when viewing access

is limited to consenting adults. Finally, in 1990, the Court upheld a state law that prohibited the private possession of photographs of nude children who are not members of the possessor's family. The decision, difficult to reconcile with *Stanley*, relied on the insidious nature of the child pornography industry and the state's need to destroy the market for these pictures as part of its anti-pornography campaign. Curiously, the four photographs in question in this case were not part of the commercial child pornography industry. The decision, *Osborne v. Ohio*, drew a strong dissent from recently retired Justice William Brennan. "When speech is eloquent and the idea expressed lofty, it is easy to find restrictions on them invalid," Justice Brennan wrote in one of his last free speech opinions. "But were the First Amendment limited to such discourse, our freedom would be sterile indeed."

Discussion:

The Ninth Amendment states that the enumeration of certain rights in the Constitution "shall not be construed to deny or disparage others retained by the people." In his essay, Robert Peck touches on themes that are basic to modern controversies about constitutional interpretation, as anyone who followed the Bork confirmation hearings will recognize. Should judges protect rights that are not mentioned in the Constitution? If so, how do they know which unlisted freedoms are worthy of protection?

Mr. Peck's answers to these questions are consistent with what is probably the dominant consensus today. He says that judges should define rights in a way that keeps them up-to-date even to the extent of protecting rights that are not mentioned in the Constitution. He argues that part of the judicial task has been and should be to find such rights in the traditions of our people. Mr. Peck concludes that, although it is unlikely that the Ninth Amendment will be relied on in future judicial opinions, it should remain a major influence in the background.

While this essay states a widely-held view, nearly every point is controversial. Some historians argue that the Ninth Amendment was designed to protect the authority of the states, so that it is an inversion of their intent to use this Amendment to authorize additional federal judicial control over state policies on such matters as abortion. Moreover, the words "other rights retained by the people" do not necessarily refer to federal rights, for the people could retain other rights through their state constitutions and laws. Anyway, many believe that courts are bound to enforce only the law, rather than morality or traditions. Even the point that judges should adapt the Constitution to modern conditions is debatable. For example, in the recent "right to die" case the Court itself said that accommodating the people's right to privacy to modern medical technology is a job for the political process in the 50 states because the issues are too shifting and too complex for the sorts of principled, inflexible solutions that courts can impose.

Obviously, the disagreements that surround the proper interpretation of the Ninth Amendment are vast and provide much room for discussion. What are the benefits and dangers of having courts rely on our "collective conscience" in defining our rights? How can looking to traditions keep our rights modern? What aspects of our moral or legal traditions might have allowed the conclusion that abortion is a protected constitutional right? How about the right of parents to control the education of their children? Or the right of the sick to die? Some have argued powerfully that the right to engage in homosexual behavior is rooted in our traditions. Do you agree? What do such arguments mean by "traditions"?

Robert Peck notes that although our judges often do protect unlisted rights, they have very seldom referred to the Ninth Amendment in explaining their decisions. As a judge, would you feel comfortable in openly relying on this provision? If not, why not?

The First and Tenth Amendments in a Federal System: The States and Free Speech

By Robert M. O'Neil

Robert M. O'Neil became founding director of The Thomas Jefferson Center for the Protection of Free Expression in 1990, after serving five years as president of the University of Virginia

A GROUP OF HIGH SCHOOL students in a San Jose, California, suburb did what millions of Americans typically do on a Saturday afternoon—they went to the nearby shopping mall. But their goal at the Pruneyard Center was not to shop or browse. Instead, they wished to reach customers of the 75 establishments in the mall with their message—opposing a recent United Nations resolution against Zionism.

The students set up a table in the mall's central courtyard, passed out leaflets, and asked shoppers to sign petitions which would be sent to the president and members of Congress. A security guard soon came along and ordered the students to leave, because they were violating a rule of the center. He asked them to move to the public sidewalk bordering the mall. Instead, they went directly to state court and filed a suit challenging Pruneyard's policies.

When the case reached the higher courts, the complexity of the issues emerged. California had always taken a broad view of the rights of people who wished to display or disseminate messages in shopping centers. So, for a time, had the United States Supreme Court, several times holding that the guarantees of free speech extended to private property so public in its use as a large shopping mall. But the highest court had reversed that policy in the 1970s, leaving shopping center leafleters and pickets with no protection under the First Amendment of the federal Constitution.

Thus Pruneyard's rules against picketing and the like seemed to be valid under the First Amendment. The hard question was whether California could, if it wished, still call such activity "free speech" even though it did not so qualify under the federal Constitution. That, said the California courts, was something the state still wished to do—and could do as part of a federal system.

This fascinating question became the central focus of the appeal to the United States Supreme Court. The justices agreed with the California court: The earlier cases, they held, do not "limit the authority of the State to . . . adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution."

This view gave profound insight into civil liberty in a federal system such as ours: "Freedom of speech" need not mean exactly the same thing at the national and state levels; California may define that liberty and others more broadly, but not more narrowly, if it wishes, than the Supreme Court has defined the parallel provisions of the federal Constitution. Such is the nature of the relationship between state and federal guarantees in our federal system.

There was a further problem, though, that caused the justices to examine

that relationship even more critically. The shopping center owners, persons of Arabic descent, apparently found the particular message offensive. They argued that being forced, in effect, to use their property for the display of an abhorrent message took away or diluted their property rights—and thus favored one person's asserted liberty against another person's equally valid claims.

The Supreme Court was sympathetic, but rejected this argument. The California courts had not forced the owners to allow display of any specific message but only to permit visitors to use the premises for peaceful expression. The justices also doubted that many shoppers would be confused or misled into believing the students' leaflets somehow spoke for the mall's owners. Should any such confusion arise, "they are free to publicly dissociate themselves from the views of the speakers or handbillers."

The *Pruneyard* case superbly illustrates the interaction between nation and state in protecting free expression. Most if not all states have guarantees of free speech and press in their own constitutions. Some of those provisions are identical to the federal First Amendment; others read rather differently—warning, for example, that speakers and writers bear some responsibility for the truthfulness or impact of what they say. And even those clauses that are taken verbatim from the First Amendment are not always interpreted in the same way by state judges; some state courts have been stricter in their protection of speech or press or religious worship, while others would take a more lenient view of government restriction. We need to understand how this complex relationship has evolved, including *Pruneyard*'s antecedents.

The Evolution of Federal and State Protections

The text of the First Amendment speaks only of federal action—"Congress shall make no law . . . ." Over the years, starting in the 1920s, the Supreme Court has extended most of the guarantees of the Bill of Rights to the states (and local governments as well). That extension is most complete in the case of free speech and press and religious liberty; the amendment has in effect been interpreted to read "Government shall make no law . . . . And occasionally, as we saw in the shopping center area, even private property owners exercising public functions may be bound by similar guarantees.

This process of incorporation or absorption now means that states may not give *less* protection to speech or religion than the federal constitution guarantees. Safeguards sometimes develop in cases involving acts of Congress, and sometimes in state cases; when such a standard emerges from the Supreme Court, its source makes little difference to its later scope and application. Once the Supreme Court has applied the First Amendment, it has set a constitutional floor below which neither Congress nor state legislatures may go in defining individual rights of speech or press.

The precise question that the Court addressed in *Pruneyard* is whether federal judgments also set a *ceiling*—that is, a standard *above* which states may not go. The answer came back quite clearly: states may not go below the federal floor, but they are not limited in any way by a ceiling. Since *Pruneyard*, other states have followed California in saying that shopping centers must allow peaceful picketing and leafleting under the state constitution even though the First Amendment does not protect them.

Federal and State Approaches to Obscenity

Several other issues arise in this fascinating relationship between state and federal approaches to free speech. Take the matter of obscenity, which has produced as much First Amendment litigation as any other single issue. The Supreme Court held in 1957 that obscenity was not protected expression. The rub has come in defining obscenity and setting standards by which juries can define it. The late Justice Potter Stewart was not the only one to remark, "I know it when I see it," but then to confess great difficulty in defining it. The later cases have struggled mightily with that definition, and have declared standards which local judges and juries do their best to follow.

The first obscenity cases reached the Supreme Court as a pair—one federal, the other state. A majority of the Court thought the constitutional issue should be treated no differently in the two cases. Only Justice Harlan argued for a different approach to the two cases. The states, he felt, had substantial and valid interests in protecting their citizens from obscene and pornographic material, even where that material involved some element of "speech" or "press." But when it came to Congress, he was wary: "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the State may do."

Justice Harlan in fact warned that Congress could invade state sovereignty by imposing uniform standards:

> The dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their idea of morality will be destroyed, the ability of states will be stunted. The fact that the people of one State cannot read some of the works of D.H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me intolerable, and violative of both the spirit and the letter of the First Amendment.

This view has had curiously little influence on the Court in the more than thirty years since Justice Harlan spoke. There was one occasion on which it might have been especially helpful. An Iowa man was charged in federal court with using the mails to send obscene material. Had he handed the material over to his customers—even in the post office lobby—he could not have been charged because at that time Iowa had suspended its criminal penalties against selling obscene material to consenting adults. One issue in all such cases is whether the charged material is patently offensive or appeals to prurient interest according to "contemporary community standards." The Iowa defendant argued that such a finding should not occur here, because the state—arguably the relevant "community"—here had spoken through its legislature in making such acts non-criminal regardless of the content.

The Supreme Court, by the barest margin, rejected this argument, and upheld the conviction. While the Iowa lawmakers had tied the hands of state prosecutors, they could not make sellers of obscenity immune from federal sanctions as well. Nor could they define "community standards" in a way that prevented jurors from exercising their own judgment in each case. All Iowa could do was to control its own police and prosecutors; it could not create within the state a zone where obscenity could circulate among consenting adults completely free

of any criminal liability.

This result reflects not only the Court's view of our federal system, but also the great deference courts paid to the "community" part of "contemporary community standards." In one of the cases that announced the current obscenity test, Chief Justice Warren Burger spoke of "the interests of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself"—interests asserted and protected through laws against obscenity and pornography.

While not all dimensions of the federal-state relationship are clear—any more in free speech than elsewhere—a workable understanding has emerged. States must follow Supreme Court decisions protecting free expression—in matters both of substance and of procedure. But the states are not limited in any way from affording their own citizens greater protection than the Supreme Court has required. That was what *Pruneyard* was all about—and suggests how profoundly important was the mission of those students who took their message to the shopping mall that Saturday afternoon.

Discussion:

This essay explains the role that the states have in protecting free speech rights. Robert O'Neil describes the *Pruneyard* case, where California was permitted to protect state free speech rights more broadly than is required under the United States Constitution. Professor O'Neil says that in general the Bill of Rights applies as a floor against both the states and the federal government, but it does not prevent states from erecting higher protections.

There are obvious advantages in allowing states to define rights more expansively than do the federal courts. Recall from Robert Peck's essay that the Ninth Amendment even specifies that the people retain rights other than those listed in the federal Constitution. State protections allow rights to be defined in ways that reflect the circumstances of particular areas of the country. Thus *Pruneyard* is supported by both the Ninth Amendment and the principle of federalism, for local definition of rights creates the advantages of variety, localism, and experimentation.

These advantages raise the question whether states ought to be permitted to respond to local conditions by restricting rights as well as expanding them. Professor O'Neil states the general rule that restriction of rights is improper, but he also notes Justice Harlan's position that states should be permitted more latitude than the national government in regulating obscenity. Localities, Harlan argued, might have special needs to restrict this kind of expression and might do so with less danger to free speech than would result from uniform national restrictions. Elements of this position can be seen in the Court's current rule that obscenity must be defined according to "contemporary community standards." Thus, the actual operation of free speech doctrine is somewhat different from the general rule.

Do you think that local variation in the definition of obscenity is useful or dangerous? Is it fair to potential defendants? Does it allow for too much restriction of speech in certain localities? Or should communities have some room to define their own norms?

These are not questions that arise only in the area of obscenity. Under the surface of national constitutional standards, there exists considerable opportunity for local variation. For example, school desegregation decrees have long permitted wide variation at the local level—some district courts emphasize racial balance while others try to improve educational quality. In its most recent abortion ruling, the Supreme Court suggested that the national standards for abortion policy set out in *Roe v. Wade* were

excessively restrictive. The Court may soon replace *Roe*'s "trimester standards" with a loose rule that allows states to regulate abortions except when the restriction is "excessively burdensome." Some see this as an abdication of the Court's obligation to protect rights; others see it as a realistic acknowledgement that abortion is too complicated to be regulated according to a single national standard. In controversial areas like obscenity, school desegregation, and abortion, do you think the Court should allow, not only for the expansion of rights, but also for their diminution?

Crucial Connection: First and Fourteenth Amendments

Donald M. Gillmor is professor of journalism and mass communication and director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota in Minneapolis

By Donald M. Gillmor

"CONGRESS SHALL MAKE NO LAW . . . abridging the freedom of speech, or of the press." But what about the state legislatures? How shall the exercise of power be divided between state and federal governments? May state legislatures enact laws forbidden to the Congress?

Our constitutional journey began 200 years ago with sovereign states jealously retaining all power not specifically delegated to the United States in the new Constitution. With respect to freedom of speech and press, Massachusetts, South Carolina and the remaining twelve states were free to "abridge" these rights within the constraints of their own constitutions. Some state constitutions contained limited, some elaborate, declarations of rights that included freedom of the press; four states, New York, New Jersey, Rhode Island and Connecticut, had no free press clause. And only two states, Pennsylvania and Vermont, thought it necessary to protect freedom of speech.

Article I, Section 10 of the federal Constitution, forbidding bills of attainder or *ex post facto* laws, or laws impairing the obligations of contracts, was among the few limitations placed upon state power. Section 9 forbade the suspension of habeas corpus except in the case of rebellion or invasion. And the Tenth Amendment stipulated that powers not delegated to the United States by the Constitution, nor prohibited to it by the States, would be reserved to the States.

"The powers reserved to the several States," wrote James Madison in the Federalist Papers, "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and internal order, improvement, and the prosperity of the State."

Yet Madison, wary of unrestrained state power, had tried in No. 14 of the 17 amendments he proposed to Congress to limit state power with respect to freedom of speech, press, conscience, and trial by jury. He failed. It was fear of the central government that would dominate and lead in 1791 to passage of the federal Bill of Rights in the form of 10 amendments to the Constitution.

The independent power of the states remained inviolate. This was demonstrated by a holding of the United States Supreme Court in the 1833 case of *Barron v. Baltimore.* The federal Bill of Rights, said Chief Justice John Marshall for the Court, would restrict only federal power. State constitutions would govern limitations on state power, in this case the destruction of a privately owned wharf as a consequence of street improvements, "a taking of private property," Barron had argued unsuccessfully against the Baltimore city council, "without just compensation."

To insure the life, liberty and property of freedmen after the Civil War, the great Fourteenth Amendment was passed in 1868 amid thundering claims that federal power was about to usurp state power and change the intended structure

of government. Key language of the Amendment is contained in the second sentence of Section I:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without *due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. [emphasis added]

It would be 63 years before the free speech of "citizens of the United States" would begin to benefit from this language. In a number of cases referred to collectively as the *Slaughterhouse Cases*, the Court in 1872 again reinforced the persistent power of the states by deciding that the "privileges and immunities" of Louisiana butchers had not been violated by a state law putting them out of business in favor of a single corporation given a monopoly license to slaughter cattle.

The Court would continue to rule that the guarantees in the federal Bill of Rights were not among "the privileges or immunities of citizens of the United States" to be protected against all forms of governmental infringement. The federal government was still viewed with suspicion, a suspicion voiced today by states rightists loath to entrust property and civil rights, as they define them, to a remote and impersonal central government.

The Process of Absorption

So any idea that the Fourteenth Amendment had somehow absorbed or incorporated all of the specific rights guaranteed by the first eight amendments (so as to protect them against state and local government) would continue to be resisted. Nevertheless, the process would move inexorably forward with a shift in focus from the "privileges or immunities" language of the Fourteenth Amendment to the words "due process of law." The significance of this language, denoting fundamental fairness, would be suggested first in cases at the turn of the century involving property rights, then in a number of criminal process cases.[1]

In 1937 Justice Benjamin Cardozo attempted to describe what some members of the Court had in mind. The guarantees of the Bill of Rights, he wrote in *Palko v. Connecticut*, "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . [which] has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed."

But how would freedom of speech and press come to be anchored in the concept of "due process"?

In February 1918, Joseph Gilbert, organization manager of the North Dakota-centered Nonpartisan League, and A.C. Townley, its president, were charged with "combining to conspire to seditiously teach men not to enlist in the U.S. army to fight Germany." There was more to it of course. Both were feared as radically socialist proponents of atheism, free love, the Kaiser's Germany, and the Soviet system, the latter two allegiances being somewhat contradictory. The league had gained power in North Dakota in 1917 and had legislated state-owned elevators, flour mills and banks, remnants of which can be found in that state today. And Gilbert was a socialist and had been editor of a socialist newspaper in Seattle.

In a "war resolution" for the league he had written: "Patriotism demands ser-

vice from all according to their capacity. To conscript men and exempt the blood-stained wealth coined from the sufferings of humanity is repugnant to the spirit of America and contrary to the ideals of democracy."

In the same resolution Gilbert had also written: "We declare freedom of speech to be the bulwark of human liberty, and we decry all attempts to muzzle the public press, upon any pretext whatsoever."

While the initial charges were aborted, five months later Gilbert was again indicted, this time at Red Wing, Minnesota, for violating Minnesota's vigorously enforced sedition law, a law that had been passed before the Federal Espionage Act and made it a crime to advocate in vocal, written or printed speech "that men should not enlist in the military or naval forces of the United States or the State of Minnesota." In a speech at Kenyon nine months earlier, Gilbert had declared that "If they conscripted wealth like they have conscripted men, this war would not last over 48 hours."

Paid witnesses and a jury of political opponents assured a guilty verdict. In December the state supreme court upheld Gilbert's conviction and he challenged the constitutionality of the Minnesota statute in the Supreme Court of the United States. Two years later in 1920, a majority of that Court upheld the state law. "The right of free speech," wrote Justice Joseph McKenna for the Court, "does not cover false and malicious misrepresentation of the objects and motives of this country in entering upon a war . . . ."

Incorporation Through the Due Process Clause

But something far more important was to be written in a powerful dissent in the case by Justice Louis Brandeis, words that would truly begin a more systematic process of "incorporating" the federal Bill of Rights through the due process clause of the Fourteenth Amendment.

Brandeis couldn't believe that the "liberty" guaranteed by the Fourteenth Amendment included only liberty to acquire and enjoy property. Surely in a democracy, he added, every citizen has a right to "teach the truth as he sees it," and that includes opinions on the conduct of government. Actually, it is his duty, for the citizen's exercise of this right "is more important to the nation than to himself. . . . In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action, and in suppression lies ordinarily the greatest peril."

The Minnesota law under which Gilbert was convicted, wrote Brandeis in what has become historic language, "affects rights, privileges and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty. *These are rights which are guaranteed protection by the Federal Constitution, and they are invaded by the [state] statute in question.*" (emphasis added)

One might think of *Gilbert* as an *intimation* of the incorporation doctrine, albeit in a dissenting opinion or what lawyers call *dicta*, and with no dependence as yet upon the due process clause. *Articulation* of the doctrine would follow in five years in *Gitlow v. New York*. Benjamin Gitlow, a revolutionary socialist, was indicted and convicted under New York's State Criminal Anarchy Act of 1902 for circulating 16,000 copies of his "Left-Wing Manifesto," patterned after the more famous *Communist Manifesto* of 1848. Gitlow's conviction was upheld by the U.S. Supreme Court over the objections of Justices Holmes and Brandeis.

Much more important to constitutional history, although not to Gitlow who was imprisoned for three years until pardoned by New York Governor Al Smith, was what Justice Edward Sanford would say in passing in his opinion for the Court. Gitlow's lawyers had claimed that the state's action was a deprivation of liberty without *due process of law* in violation of the Fourteenth Amendment. The Court disagreed in the case at hand but said, again in *dicta*, but this time under the aegis of the Court's opinion:

"For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—*are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.*" (emphasis added)

Incorporation of Free Speech and Press

This language, part of the rhetoric of Gitlow's attorneys in arguing the case and of Justice Brandeis in his *Gilbert* dissent, marked a dramatic change of direction in our constitutional travels. The language made way for the first application of the incorporation doctrine to speech and press in the great "no prior restraint" case of *Near v. Minnesota* eleven years later in 1931. That case involved another Minnesota statute, this one abating as public nuisances any "malicious, scandalous, and defamatory" newspapers and periodicals. The target of the legislation was originally a flamboyantly moralistic Duluth newspaper called the *Rip-Saw*. In the *Near* case, the newspaper was an anti-Semitic, anti-Catholic weekly known as *The Saturday Press* that specialized in scandal, blackmail, and attacks on public officials, many of whom deserved it. This time the state law fell.

Chief Justice Charles Evans Hughes in his opinion for the Court rejected the injunction that the Minnesota law permitted a court to use in order to close the newspaper:

> The recognition of authority to impose previous restraints upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it admission of the authority of the censor against which the constitutional barrier was erected. . . . Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create public scandal, but the theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication.

As important as *Near* may have been in erecting judicial barriers against prior restraint—indeed "national security" and "fair trial" may be the only excuses left for preventing publication—the case represents the first application of the incorporation doctrine, the first use of the due process clause of the Fourteenth Amendment to protect freedom of speech and press from state and local governments.

The Court would reiterate this great principle in the landmark case, *The New York Times v. Sullivan* (1964), when the Court held that criticism of any level of government was no longer a punishable crime, and that agents of the government could win money damages for libel in a civil case only upon a showing of actual malice, that is, knowing falsehood or reckless disregard as to truth or falsity.

Gilbert, Gitlow and *Near* together reflect a revolution in our constitutional

legal system. Since *Near*, all branches of state and local governments have been subject to federal judicial discipline under the due process clause in their treatment of freedom of speech and press. And since 1931, notably during the tenure of Chief Justice Earl Warren, the Court has absorbed or incorporated through the Fourteenth Amendment at an accelerating rate almost every guarantee of the federal Bill of Rights.

Freedom of speech and press were absorbed gradually in the three cases discussed above. Through individual cases and controversies came freedom for and from religion, freedom of assembly and petition, proscriptions against unreasonable searches and seizures, self-incrimination, double jeopardy, and cruel and unusual punishments, the assurance of a speedy, public trial before an impartial jury, the assistance of counsel, and just compensation for property taken.[1]

All are now considered to be fundamental rights of citizenship, protected against all forms of governmental infringement, local, state or federal. It is not at all clear whether those who proposed, debated and passed the Fourteenth Amendment intended it to become a vehicle for imposing U.S. Supreme Court discipline on all levels of government, in fact there is only fragmentary evidence that they did. And the incorporation doctrine itself has never commanded a majority of the Court. But that is how our constitutional system has evolved.

Perhaps we owe a debt of gratitude to the radical speech of Joseph Gilbert for triggering a process that was made possible by *Gitlow*, became operable with *Near*, and is still proceeding to weave other guarantees of the first eight amendments into the fabric of our fundamental law, even though some justices question the particular pattern of federalism that has emerged.

Disagreement continues to revolve around the incorporation doctrine. There has never been perfect consensus on the Supreme Court as to its historical or juridical validity. Perhaps federal power *has* usurped the legitimate authority of the several States. It is left to us to contemplate what kind of a society we might be if there had never been a Joseph Gilbert, a Benjamin Gitlow or a Jay Near. Would the crucial connection between First and Fourteenth Amendments have been forged, and would our speech and press be as relatively free as they are from the power of majorities and the pressures of vocal minorities?

One lesson is abundantly clear: only when the speech and press of the least "respectable" and least popular among us are at issue do we truly test our commitments to those freedoms.

1. The 1908 self-incrimination case of *Twining v. New Jersey*, the trial of five Afro-Americans convicted by a mob-dominated judge and jury in the 1923 case of *Moore v. Dempsey* and in the 1932 case of *Powell v. Alabama*, where the defendants were denied the assistance of counsel.

Discussion:

Donald Gillmor traces out in colorful detail the history of the "incorporation doctrine." This is the doctrine that applies most of the Bill of Rights against the actions of state and local governments. Without it, states might violate free speech rights or create official churches. In fact, Professor Gillmor shows that such results were quite possible at the time the first 10 amendments were adopted, inasmuch as the new protections were universally understood to apply only to actions of the national govern-

ment. This understanding was reaffirmed a number of times even after the enactment of the due process clause of the Fourteenth Amendment in 1868.

The conclusion that the protection of our liberties from "deprivation without due process of law" includes protection of most of the Bill of Rights emerged only gradually during this century. It was not until 1931 that the due process clause was used to protect free speech rights. After 1931 we experienced a constitutional "revolution" as the Court declared that one after another of our rights against the federal government also protect us against state action. Donald Gillmor says that this revolution was not intended by those who framed the first 10 amendments, and it is not even clear that it was intended by those who enacted the due process clause. Nor have the justices formed a consensus on the legal basis for the incorporation doctrine—indeed, "Perhaps federal power *has* usurped the legitimate authority of the several States."

Despite the slowness and uncertainty that has characterized the emergence of the "incorporation doctrine," it is a solidly entrenched rule today. Not even the fierce critic of judicial over-reaching, former Judge Robert Bork, questions its current validity. The contrast between the doctrine's somewhat shaky basis and its firm legal status raises an important question. If acceptance of basic constitutional principles is not necessarily based on agreement about textual meaning or the Framers' intent or judicial explanation, what else might it be based on?

No one doubts that the application of the Bill of Rights to the states has accomplished a great deal of good. But, as both this and the preceding essay intimate, it may also have caused some harm by nationalizing issues that might better have been left to local governments. In a recent case, the Supreme Court expressed doubt about its own capacity to protect the principle of federalism. Professor Gillmor's account of the growth of the incorporation doctrine tends to confirm this pessimistic assessment. At any rate, the Court has said that the appropriate place for states to protect their interest in local control is the Congress. What dangers and what advantages could you foresee if Congress were to legislate to establish broader local control over religion or police behavior or abortion policy? A few years ago a bill was introduced in Congress that would have done away with the incorporation doctrine itself. If this proposal had become law, what do you think would have been the real-world consequences?

Glossary of Key Terms

Amicus curiæ—"a friend of the court;" one who volunteers information upon some matter of law.

Bill of attainder—a legislative act directed against a specific person or a readily identifiable group pronouncing guilt of an alleged crime without trial or conviction.

Common law—law that is derived from the judgments and decrees of courts; also called case law.

Dicta—parenthetically; an opinion not part of the actual ruling in a case.

Due process—the Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that the government shall not deprive individuals of life, liberty or property unless fair procedures have been followed.

Equal protection—clause in the Fourteenth Amendment of the U.S. Constitution that forbids the federal government or any state to deny to any person within its jurisdiction the equal protection of the laws; this is the major constitutional restraint on the power of governments to discriminate against persons because of race, national origin or sex.

Ex post facto—"after the fact," or, in other words, retroactive.

Fundamental rights—not all rights recognized by the Supreme Court are treated equally; those considered "fundamental" are less likely to yield to competing state interests.

Gag order—order by a judge to witnesses and attorneys not to discuss with the public a case before the court.

Implied authority—that which is necessary, usual or proper to accomplish or perform an expressed authority, power or right.

Injunction—a mandatory or prohibitive order issued by a court.

Judicial activism—a doctrine of judicial decision-making that does not restrict judges to applying the literal words of the Constitution or to discerning the intention of the Framers, but that allows them to interpret the Constitution as a living document to be adapted to evolving social values.

Judicial restraint—the doctrine that judges, in deciding cases, should declare unconstitutional only those executive or legislative actions that clearly violate the words of the Constitution or the intent of the Framers, and that constitutional changes should be left to the amendment process; refers also to the idea that, in deciding cases, judges should decide as little as possible to resolve the issues presented by the cases.

Judicial review—the authority of judges to examine congressional legislation and executive actions to determine their constitutionality; this judicial power was spelled out in the *Marbury v. Madison* (1803) decision of the Supreme Court.

Penumbra doctrine—rights rooted in the shadow of the Bill of Rights.

Prior restraint—prohibition imposed prior to the printing or airing of a news story by the media, the publication of an article or book, the giving of a speech, the showing of a movie, etc.

Pro forma—when used in an appealable decree or judgment, the phrase usually means that the decision was rendered merely in order to facilitate further proceedings.

Right of privacy—the Constitution does not mention privacy, but the Supreme Court has extended the word "liberty" in the due process clause of the Fourteenth Amendment to protect the idea of privacy rooted in the Fourth Amendment.

Stare decisis—Latin for "to be as it has been decided," this doctrine holds that once a court has laid down a principle of law, it should adhere to it in later cases; to establish a precedent.

Statutory law—law enacted by the Congress or a state legislature.

Unenumerated rights—those not expressed in the Constitution or in the papers of the Framers but protected by federal courts; the Ninth Amendment expressly says that the idea of "rights" should not be confined to what is specified in the Constitution.

Venue—the specific court within a jurisdiction in which a case must be filed.

Voir dire—the questioning of prospective jurors to determine their competence or fitness to serve on a jury.

Writ of habeas corpus—court order requiring the custodian of a confined person to explain in court the basis for the confinement.

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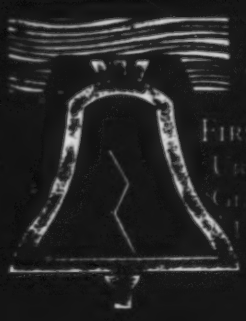
First Amendment Congress
University of Colorado at Denver, Graduate School of Public Affairs
1445 Market Street, Suite 320, Denver, Colorado 80202
303/820-5688



First Amendment Congress
University of Colorado at Denver
Graduate School of Public Affairs
1445 Market Street, Suite 320
Denver, Colorado 80202